No. 13,653

IN THE

United States Court of Appeals

For the Ninth Circuit

CHIN LIM MOW,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

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Subject Index

Page

Statement of jurisdiction 1

Statement of the case 2

Appellant's background 4

Real property involved in the case 6

The partnership issue 7

The Wai Yuen Gambling Club 11

The net worth case 13

The net worth case—Chang trustee account.................................... 16

The net worth case—Wai Yuen Club.................................... 17

The charge to the jury 18

Specification of errors 18

Argument 31

I. Instructions to jury, given and refused 31

1. The court erred to the prejudice of the appellant in instructing the jury that the failure of the defendant to offer explanation of the government's evidence might be considered by the jury in arriving at their verdict (Specification No. 15) 32

2. The court erred to the prejudice of the appellant in failing to instruct the jury as to the legal norms applicable to the net worth-expenditures method of establishing taxable income (Specification No. 16) 53

3. The court erred to the prejudice of the appellant in instructing the jury regarding evidence of the possession of money and the expenditure of money (Specification No. 17) 57

4. The court erred to the prejudice of the appellant in instructing the jury as to the relevancy of evidence pertaining to the practice of gambling and the income therefrom during the year 1945 (Specification No. 18) 59

Page

5. The court erred to the prejudice of the appellant in instructing the jury as to the standard for determining criminal intent (Specifications Nos. 19 and 20) 62

6. The instructions, taken as a whole, were unbalanced and did not fairly present the issues.... 69

II. Errors in admission of evidence 70

1. The court erred to the prejudice of the appellant in admitting in evidence testimony of the witness William A. Wallace in respect to information and instructions received from appellant in connection with the preparation of tax returns of which said witness had no testimonial knowledge (Specifications Nos. 1, 2, 3, 4, 5).......... 70

2. The court erred to the prejudice of the appellant in admitting in evidence the conclusions and opinions of the witnesses William A. Wallace and James L. Wiley, as to the character and ownership of Gerdon Land Co. Accounts Payable and in admitting in evidence, during the Government's examination of the witness Liston O. Allen, Exhibits Nos. 92, 93, 94, 95, 247 and 248 Specifications Nos. 6, 7, 8) 76

3. The court erred to the prejudice of the appellant in admitting in evidence extracts of a statement made by Government witness William A. Wallace to the Intelligence Unit (Specification No. 9) 84

4. The court erred to the prejudice of the appellant in admitting in evidence during the Government's examination of the witnesses Evelyn Lee Chang, L. F. Clarke, Dana E. Bremner, Leon Banker, and Norman Ogilvie, certain oral and documentary evidence of transactions pertaining to the Pacific National Bank trustee account of Howard and Evelyn Lee Chang and the purchase of "The Quarry" (Specifications Nos. 10, 11 and 12).... 87

Page

5. The court erred to the prejudice of the appellant in admitting in evidence testimony of the witness George Gibbons pertaining to trips made at appellant's direction (Specification No. 13).... 93

6. The court erred in permitting Government witness Brady to assume facts contrary to the evidence (Specification No. 14) 95

III. Denial of motion for new trial 100

1. The court's denial of the appellant's motion for a new trial was a manifest abuse of discretion (Specification No. 21).................... 100

Conclusion 100

Appendix.

Table of Authorities Cited

Cases Pages

Adamson v. California (1947), 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903, 171 A.L.R. 1223 ....34, 35, 36

Bell v. United States (1950), 4 Cir., 185 F.2d 302, cert. den. 340 U.S. 930, 71 S.Ct. 492, 95 L.Ed. 671................ ....39, 40, 41, 42, 43, 44, 45, 46

Bradford v. United States (1942), 5 Cir., 130 F.2d 630....42, 43

Brodella v. United States (1950), 6 Cir., 184 F.2d 823....56, 99

Bruno v. United States (1939), 308 U.S. 287, 60 S.Ct. 198, 84 L.Ed. 257 ....33, 36, 37, 47, 50, 52

Bryan v. United States (1949), 5 Cir., 175 F.2d 223 ....56, 99

Caminetti v. United States (1916), 242 U.S. 470, 37 S.Ct. 128, 61 L.Ed. 442 44

Cavness v. United States (1951), 9 Cir., 187 F.2d 719, cert. den. 341 U.S. 971, 71 S.Ct. 1019, 95 L.Ed. 1374......... 100

Cummings v. Pennsylvania R. Co. (1930), 2 Cir., 45 F.2d 152 ....49, 52

Dennis v. United States (1950), 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 65

Ellis v. United States (1943), 8 Cir., 138 F.2d 612 86

Felton v. United States (1878), 96 U.S. 699, 24 L.Ed. 875 64

Gleckman v. United States (1935), 8 Cir., 80 F.2d 394.... 56

Hickory v. United States (1893), 151 U.S. 303, 14 S.Ct. 334, 38 L.Ed. 170 86

Jelaza v. United States (1949), 4 Cir., 179 F.2d 202........ 43

Johnson v. United States (1942), 318 U.S. 189, 63 S.Ct. 549, 87 L.Ed. 704 36

Kotteakos v. United States (1946), 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 ....52, 100

Langford v. United States (1949), 9 Cir., 178 F.2d 48......50, 52

Morris v. United States (1946), 9 Cir., 156 F.2d 525....... 55

Pages
Pollack v. United States (1953), 5 Cir., 202 F.2d 281...... 55

Remmer v. United States, decided May 28, 1953 (not yet reported) 55
Rossi v. United States (1933), 289 U.S. 89, 53 S.Ct. 532, 77 L.Ed. 1051 ......41, 42

Screws v. United States (1945), 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 ......52, 65, 68
Spies v. United States (1943), 317 U.S. 492, 63 S.Ct. 364, 87 L.Ed. 418 65

United States v. Chapman (1948), 7 Cir., 168 F.2d 997....56, 99
United States v. Fenwick (1949), 7 Cir., 177 F.2d 488..53, 56, 99
United States v. Grady, 7 Cir., 185 F.2d 273...... 100
United States v. Graham (1939), 2 Cir., 102 F.2d 436..... 86
United States v. Hayes (1949), 9 Cir., 172 F.2d 677....... 100
United States v. Hornstein (1949), 7 Cir., 176 F.2d 217.... 43
United States v. Martell (1952), 3 Cir., 199 F.2d 670...65, 67, 68
United States v. Murdock (1933), 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381 ......63, 64, 65
United States v. Ragen (1941), 314 U.S. 513, 62 S.Ct. 374, 86 L.Ed. 383 65
United States v. Ward (1948), 3 Cir., 168 F.2d 226........48, 49

Wilson v. United States (1893), 149 U.S. 60, 13 S.Ct. 765, 37 L.Ed. 650 36
Wolcher v. United States (1952), 9 Cir., 200 F.2d 493...... 100

Constitutions

United States Constitution:
Fifth Amendment 32, 33, 34, 36
Fourteenth Amendment 35

Statutes

Internal Revenue Code, Section 145(b) 1, 65, 66

Revenue Act:
Section 146(a) 63
Section 1114(a) 63

Pages

United States Code Annotated:
Title 18, Section 3231 1
Title 18, Section 3481 .... 32, 47, 50
Title 28, Section 145(b) 1, 39
Title 28, Section 632 32
Title 28, Section 1291 2
Title 28, Section 1294 2

Texts

32 C.J.S., Evidence, Section 451 82

Cyclopedia of Federal Procedure (3d Ed.), Vol. 8, Section 26.137 et seq. 86

Rothwacks, Criminal Tax Prosecutions, Proceedings of New York University Eighth Annual Institute of Federal Taxation (1950) at pp. 260-261 56

Wigmore on Evidence (3d Ed.):
Vol. 2, Section 655 73
Vol. 2, Section 656 73
Vol. 2, Section 657 73
Vol. 5, Section 1362 74
Vol. 8, Section 2252 32
Vol. 8, Section 2272 35
Vol. 8, Section 2273 .... 44, 45

Rules

Federal Rules of Criminal Procedure:
Rule 18 1
Rule 33 100
Rule 37(a) 2

No. 13,653

IN THE

United States Court of Appeals
For the Ninth Circuit

CHIN LIM MOW, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	

BRIEF FOR APPELLANT.

STATEMENT OF JURISDICTION.

By indictment filed in the United States District Court for the Northern District of California, Southern Division, the appellant was charged in two counts of violating, within the jurisdiction of that Court, Section 145 (b) of the Internal Revenue Code, 28 U.S.C.A., Sec. 145 (b) (Tr. 3). The District Court had jurisdiction pursuant to 18 U.S.C.A., Sec. 3231 and Rule 18, Federal Rules of Criminal Procedure.

The appellant entered a plea of not guilty (Tr. 6). Upon the first trial, the jury were unable to reach an agreement. Upon the second trial, the jury returned a verdict of guilty on both counts (Tr. 75). By judgment filed and entered on November 3, 1952,

the appellant was sentenced to imprisonment for a term of five years on each count, said terms to run consecutively, and to pay a fine of $10,000.00 on each count, or a total of $20,000.00 (Tr. 84).

Notice of Appeal to this Court was filed on November 3, 1952, within the time allowed by Rule 37 (a), Federal Rules of Criminal Procedure (Tr. 87). Jurisdiction of this Court to review the final decision of the District Court is sustained by 28 U.S.C.A., Secs. 1291 and 1294.

STATEMENT OF THE CASE.

The indictment charged the appellant with attempting to defeat and evade the income tax owing by him and his wife, Chin Wong Shee, for the year 1945, by filing false and fraudulent returns for himself and his wife, computed on the community property basis, wherein he understated his and her net income and the amount of tax due thereon (Tr. 3-5). The first count pertained to appellant's return for the year 1945; the second count to his wife's return for the same year. The returns were almost identical in content except for the name of the taxpayer (see Exhibits 1 and 2).

In each of the counts it was charged that the income tax returns referred to therein, reported a net income of $27,170.83 and a tax of $11, 646.03, whereas the net income was $110,279.96 and the tax $78,629.55 (Tr. 3-5). It is thus seen that the indictment charges

a deficiency in income in respect to the return of each spouse in the sum of $83,109.13, representing a total deficiency in income for the marital community of $166,218.26 before the usual "splitting" of income for computation on a community property basis.

The record is voluminous. The printed transcript of record is in five volumes and covers 2127 pages. Thirty-seven witnesses testified at the trial. Documentary evidence consisted of approximately 400 exhibits which, though not included in the printed transcript of record, have been made a part of the record on appeal (Tr. 91, 2111, 2127).

The prosecution attempted to establish its case along two general lines or methods of proof: (a) the so-called "primary" or "direct" method—by proving certain alleged specific items of income omissions. These items were tabulated by the prosecution in Exhibit 334; (b) the so-called "secondary" or "indirect" method—in this instance the so-called "net worth and expenditures method". According to this method, any increase in the taxpayers' net worth during a certain period (viz., the year 1945) together with certain nondeductible expenses (e.g., personal living expenses) represents the taxable net income for the year (Tr. 1799-1800). The prosecution's net worth analysis of appellant is found in Exhibits 337-346; the defense net worth analysis in Exhibits DD and DE. The principal summary documents for the net worth calculations of the Government (Exh. 339) and of the appellant (Exh. DD) have been reproduced in the Appendix.

For the purpose of throwing light on appellant's intent, the prosecution introduced extensive evidence of allegedly similar acts and transactions of appellant, both prior and subsequent to the year 1945.

Although witnesses were called in defense and documentary evidence introduced, the appellant did not testify in his own behalf.

Appellant's background.

During the year 1945 and for some years prior thereto, appellant was a person of substantial wealth and a number of financial interests. At the beginning of the tax year covered by the indictment, 1945, his net worth according to the prosecution was $886,473.37 (Exh. 339) and according to the defense, $829,370.53 (Exh. DD). Both of the foregoing exhibits point up the variety of appellant's interests—partnerships operating real property, hotels, apartment houses and an office building; interests (as partner or stockholder) in wholesale and retail businesses located in San Francisco's Chinatown; a Chinese gambling club known as the Wai Yuen Club, and a miscellany of the usual personal assets, such as a home, automobile, life insurance, defense savings bonds, and real property. The tax returns of appellant and spouse for the year 1945 (Exh. 1 and 2) disclose that the principal sources of appellant's income were two: (1) rentals from real property, and (2) profits from the above gambling club.

During the year 1945 and for seven years prior thereto, appellant employed two accountants, William

A. Wallace and David Shew, each of whom testified on behalf of the prosecution (Tr. 754, et seq.; 1054, et seq.). Wallace's services began about 1938 or 1939 (Tr. 1148), at which time he also began rendering services to the Gerdon Land Co., a corporation also involved in appellant's tax background (see postea). He was appellant's tax consultant (Tr. 1147). His office set up and maintained books and records for the Gerdon Land Co. (Tr. 1148; Exh. 56, 56A and 56B); for five hotel operations conducted by the Admay partnership in which appellant had an interest (Tr. 1166-67; Exh. CL, CM, CN, CO and CP); assembled and retained written statements of rental income collected by certain real estate agents (Tr. 400); and attended to the preparation and filing of the tax returns of appellant and spouse (Exh. 1-10), four of appellant's children (Exh. 22-25, 29, 50-53, 55), the partnerships operating on the real property owned by appellant and by Gerdon Land Co. (Exh. 14-21, 30, 61-63, 66-70) and the corporate tax returns of the above Gerdon Land Co. (Exh. 304). (See testimony of Wallace, Tr. 1056-1117 passim).

David Shew rendered services to appellant continuously from 1939 or 1940 in connection with records of the Wai Yuen gambling club (Tr. 756). Starting on December 31, 1942, he set up and thereafter kept books of account in the English language for said club (Tr. 882; Exh. 184). He also within the scope of his activities was appellant's tax consultant (Tr. 875). He prepared annual profit and loss statements for the gambling club (Exh. 60) which were sent to

Wallace who incorporated this information in appellant's tax returns (Tr. 891). He also prepared tax returns for one of appellant's children (and spouse) who lived in San Francisco (Exh. 26-7, 54) and for several of appellant's associates in the Wai Yuen gambling club (Tr. 42-47).

The importance of both tax consultants in their role as prosecution witnesses is clear. Wallace's functions pertained to appellant's real estate income and the preparation of appellant's tax returns; Shew's functions pertained to appellant's gambling income from the Wai Yuen Club. Thus both covered the two principal sources of appellant's income. The length of their testimony in the record (Wallace 354 pages; Shew 299 pages; together almost one-third of the printed record) is significant.

Real property involved in the case.

We have already adverted to the fact that one of appellant's principal sources of income was from real property. This real property falls into two general classifications: (1) that owned by appellant himself and commonly referred to as "Chin property"; (2) that owned by Gerdon Land Co., a California corporation (Tr. 1181). No issue arose at any time during the trial either as to the parcels of property included in the first class, the ownership of which appellant freely admitted to the Revenue Agent at the beginning of the investigation (Exh. 169, Tr. 374), or as to the separate legal existence of the Gerdon Land Co. and its ownership of property of the second description.

The partnership issue.

Some of the real estate in each of the above two classifications was operated by partnerships during the years covered by the evidence. These partnerships also fall naturally into two groups depending on whether they were operated on appellant's property ("Chin" property) or the corporate property of Gerdon Land Co. ("Gerdon" property). In 1945 there were eight such partnerships, six of them on "Chin" property and two on "Gerdon" property (Tr. 1182) as follows:

Partnerships on Chin Property

Location	Tax Return
843-7 Clay Street, San Francisco	Exhibit 15
112-32 Waverly Place, San Francisco	Exhibit 17
674 Jackson Street, San Francisco	Exhibit 19
1555 Oak Street, Oakland	Exhibit 20
23rd and Broadway, Oakland	Exhibit 21
Pierce Building, Oakland	Exhibit 30

Partnerships on Gerdon Property

Location	Tax Return
Admay Company*	Exhibit 13
San Fran Hotel	Exhibit BU

Wallace's office prepared the partnership returns of income for all of the above (Tr. 1056-1117 passim). In some locations his office had been doing it year after year (Exh. 14, 16, 18, 61, 62, 66, 66(a), 67-70, 318-24). During these years Wallace's office followed

*The Admay Company conducted ten separate hotel and apartment house operations on property which it leased from Gerdon Land Co. (Tr. 418-9; 1164).

the routine of transposing from such partnership returns to the individual returns being prepared for appellant and his family, the partner's share or distribution of profit appearing on the partnership return (Tr. 1180). At the time the above eight partnership returns were prepared and filed by Wallace's office, he knew the state of the title (Tr. 1182). It was not disputed that in each instance the items of income and expense (including the depreciation which Wallace's office calculated) were accurately reported. None of the Government agents (witnesses Wiley, Farley and Filice) challenged the accuracy of these figures. Wallace's office, through his associate Peffers, considered the validity of the operations as partnerships for tax and accounting purposes (Tr. 1244). The use of these partnerships in earlier years was known to the Bureau of Internal Revenue and a subject of discussion among its agent Charles King, Wallace and appellant (Tr. 1200).

In development of its "specific item" method of showing income omissions, the Government sought to prove that the partnerships were fictitious and were in reality employed by appellant to put his real estate income in the "lower tax brackets". In support of this contention, the Government elicited from its witness William A. Wallace, one of appellant's accountants, testimony to the effect that Wallace had received from appellant information and instructions as to the division of the partnership income among the various partners (Tr. 1063-1105, passim). In addition, the Government sought to show that such instructions of

appellant to Wallace even extended to the manner of reporting income on the tax returns of certain of appellant's children, which Wallace had prepared at appellant's request (Tr. 1109-1117). On both of these subjects, Wallace, during his cross-examination testimony, admitted that in fact he had no personal knowledge of the above facts which were relied upon to support the charge of fictitious partnerships (Tr. 1290-94). Appellant's motion to strike the foregoing testimony was denied (Tr. 15, 1948). In an attempt to further support the contention that the partnerships were fictitious and a scheme of evasion, the prosecution sought to show that the money derived from the partnerships actually wound up in appellant's hands. Analysis by Special Agent Filice (Tr. 1652-83) showed some of the money going into appellant's personal bank account, although, all in all, it appeared that appellant disbursed for the account of his children just about as much money as came into his hands representing their share of partnership profits (Tr. 1741). It appeared, however, that the proceeds from the largest partnership operation, namely, the Admay Company, did not go to appellant but went to the Gerdon Land Co., from which corporation the Admay Company partnership leased certain properties for operation. The receipt of these proceeds by the Gerdon Land Co. appeared on the corporate books of Gerdon Land Co., and in particular, in that portion of the general ledger entitled Accounts Payable No. 20 (see Exh. 56, 56a and 56b). In an attempt to show that the balance of the aforementioned Accounts Payable No. 20 actually repre-

sented a liability of the corporation to appellant and that, therefore, appellant owned this obligation, the Government produced testimony from appellant's accountant William A. Wallace (Tr. 1124-25) to the effect that the moneys represented by the account were owed by the Gerdon Land Co. to one person only, and that person was appellant. Wallace admitted on cross-examination (Tr. 1298, et seq.) to having given different testimony on the first trial of the case. In addition, the Revenue Agent Wiley identified Accounts Payable No. 20 with appellant (Tr. 380-479). As a final and concluding step to the theory of proof, the prosecution introduced in evidence, over appellant's objections, certain cancelled checks of Gerdon Land Co. delivered and payable to the order of appellant in the years 1946 and 1947, and after the year of indictment, all involving substantial sums of money.

The troublesome and confusing nature of family partnerships in the law of income taxation appears from the Government's own evidence. The particular partnerships in which appellant was involved were admittedly subjects of discussions between Revenue Agent Wiley, who in 1946 began an audit of appellant's tax affairs from the years 1942 through 1945, and William A. Wallace who appeared as appellant's tax consultant (Tr. 459-1261). Wiley admitted that the partnership question was a troublesome and confusing one. Wallace testified that Wiley had suggested a single family partnership for appellant (eventually reflected in Exh. 63), an idea which Wallace frankly admitted did not originate with appellant at all. In

connection with this testimony, and over appellant's objections, the prosecution were permitted to ask Wallace a number of questions referring to a previous sworn statement he had given the Intelligence Unit, the apparent purpose of which inquiry appears in the record to be an attempt by the Government to impeach its own witness (Tr. 1415, et seq.).

The Wai Yuen gambling club.

Appellant's gambling activities were conducted under the fictitious name of Wai Yuen Club. The existence and nature of the operation of this club was known to the Government for several years. Partnership returns of income filed by appellant in earlier years contained the words "house of games" as a description of the business (see Exh. 48-49). The Wai Yuen Club is referred to in Exhibit 58 relied upon by the Government as its net worth starting point. Substantial income from the Wai Yuen Club appears on all of the individual returns of income of appellant and his wife for the years 1942 through 1945, said returns in the year 1945 showing the following: From Wai Yuen, Wai Hung and Wai Lee Companies, $44,446.76 (see Exh. 1).

Books of account for the Wai Yuen Club were kept by appellant's accountant David Shew who testified as a witness for the Government.

Mr. Shew kept the Wai Yuen books from 1942 or 1943 until 1945 or 1946 (Tr. 756), although he had first been employed by appellant either in 1939 or 1940. These books of account were introduced in evi-

dence by the Government (Exh. 184, 184a). Profit and loss statements were prepared by Shew from year to year for the gambling activities (Exh. 60, Tr. 768), which were then sent to appellant's accountant Wallace for incorporation in appellant's tax returns.

Actually, the club had various locations depending upon the vicissitudes of law enforcement (Tr. 880).

In connection with the gambling club, the Government introduced evidence through the witness Shew that during the year 1945 appellant had paid certain bonuses to six of his employees in the club, totalling $25,000, claiming that the bonuses were in fact fictitious. The Government's proof in this respect was directed actually to the disallowance of a business deduction claimed to be improper and through the testimony of the witness Shew involved a long, sometimes confusing, and frequently inconsistent series of evidentiary facts having to do not only with the bonus transaction itself but with the charge that appellant employed Shew to prepare the individual returns of the bonus recipients and also paid the income tax of such recipients. Accordingly, in the year 1945, the Government listed the above $25,000 as a specific item of omission in Exhibit 334, its list of omissions under its first method of proof. However, with the exception of the above, there was no direct evidence anywhere in the record that appellant failed to report the entire income from his gambling club.

The Wai Yuen Club was raided by the San Francisco Police Department on February 4, 1945, while it was occupying the premises known as The Palms,

at which time the authorities seized currency and silver dollars in the total sum of $42,259.40 plus an estimated $5000.00 in small coins, making a total of $47,259.40 (Tr. 168-173). This amount was taken into account by appellant in his net worth analysis (Exh. DD) as the bank roll of the club at December 31, 1944, but was not similarly treated by the Government in its net worth analysis (Exh. 339). Shew, who was familiar with the books of account of the gambling club, testified that the club was closed during the last three months of the year 1945 (Tr. 914). This was confirmed by the absence of entries for transportation expenses in the books of the club (Exh. 184) during this time, the club having functioned on a basis of transporting its patrons to its premises by limousine. Despite this evidence and in the absence of any evidence as to the existence of a bank roll at the end of the year, the Government carried the same $50,000 as an existing bank roll of cash on hand at December 31, 1945 (see Exh. 339).

The net worth case.

The prosecution's net worth analysis of appellant and his wife is found in detail in Exhibits 280-4, 286, 337-346. It is hoped that reference to these exhibits may shorten this statement of the case. Of the foregoing, Exhibits 337, 339, 340 and 342 constitute principal statistical summaries, the balance of the exhibits being of a subsidiary character. In Exhibits 337 and 339, assets and liabilities are assembled to arrive at net worth computations as follows: At December 31, 1941 (the "starting point"), $323,255.94;

at December 31, 1944 (the "opening net worth" for the year under indictment), $886,473.37; at December 31, 1945 (the "closing net worth"), $1,115,155.04. In Exhibit 342, calculations of understatement of income based on an increase in net worth plus nondeductible expenditures and minus nontaxable income result in a figure of $216,572.73 for 1945, the year under indictment. Similar calculations in Exhibit 340, give a figure of $559,502.77 for the period 1942-1944.

The above exhibits were prepared by, and introduced in evidence during the testimony of the witness Augustus V. Brady, technical adviser assigned to the Penal Division of the Bureau of Internal Revenue, over appellant's objections (Tr. 1802-26).

Although Brady stated that the data which he thus summarized was "secured from evidence given at this trial" (Tr. 1801), he admitted on cross-examination that the basis for the inclusion of every item on the various charts was a direction to him by the prosecuting attorney (Tr. 1872). Although he "felt they were in accordance with accounting principles" (Tr. 1874), it appears that in instances he was "not taking responsibility for these figures" but merely doing what the prosecuting attorney told him to do (Tr. 1877, 1883). The strong resistance of the prosecuting attorney to appellant's inquiries into this aspect of the charts (prosecution's objections were overruled by the Court) is significant (Tr. 1872-5).

As a result, many entries on the charts represented assumptions of Brady for which there was no basis in the evidence. All bank accounts (the balances but

not the ownership of which had been agreed upon in Exhibit 311) were charged to appellant in Exhibit 345, and carried over into Exhibits 337 and 339, although some of them were in the names of appellant's children (Tr. 1879), and although in respect to other items the interests of children had been excluded (Tr. 1880-1). Although the charts included assets carried in the name of appellant's children (Tr. 1882), it was obvious that no attempt was made to include all the assets of the children (Tr. 1883). Brady admitted that he had not taken into account in the charts several assets identified in appellant's tax returns (Tr. 1884-1891). This had a direct bearing on appellant's opening net worth.

A comparison of the prosecution's net worth analysis for the indictment year (Exh. 339) with that of the defense (Exh. DD) will show that for all practical purposes no issue arose with respect to seventeen items of assets or with respect to any liability item. The major difference between the two analyses existed in the items representing cash on hand, miscellaneous deposits and the Wai Yuen Club and its bank roll. The difference in the cash and deposits items arises out of the Howard and Evelyn Lee Chang trustee account transactions and represents an addition of $100,000 to appellant's closing net worth and thus to his reconstructed income. The difference in the Wai Yuen Club items revolves about a closing bank roll of $50,000 and the failure of the prosecution to take into account liabilities of $21,219.80. If these two items totalling $171,219.80 were in error and had no basis in evidentiary data, the admission of the

charts was gross error. We shall treat each of these matters under separate headings.

The net worth case—Chang trustee account.

Mr. and Mrs. Chang maintained a trustee account at the Pacific National Bank in San Francisco. It was identified by one Clarke, an official of the bank (Tr. 1456). The witness Evelyn Lee Chang testified the account was opened "as a trusteeship" for one C. C. Wong and in her husband's absence and Wong's absence, she was to take instructions from appellant (Tr. 1496). Signature and ledger cards of the account (Exh. 230 and 239) were admitted in evidence over objection (Tr. 1494-5). The account was opened with a deposit of currency in the sum of $30,000 (Tr. 1458), which was not traceable to appellant. At the request of appellant, Mrs. Chang drew $12,500 from the account in the form of a cashier's check which she delivered to appellant. This was charged to appellant's closing net worth as a deposit on "The Quarry" (see Exh. 338). The balance of $17,500 in the account at December 31, 1945, was also charged to appellant (see Exhibit 278). On January 3, 1946, appellant delivered $70,000 currency to Mrs. Chang which she deposited in the account (Tr. 1498) at the same time drawing a check of $84,000 to a title company (Exh. 235). The prosecution also charged the above $70,000 to appellant as cash in hand at December 31, 1945 (see Exh. 278). The net effect of all this was to add $100,000 to the income of appellant reconstructed on a net worth basis.

The net worth case—Wai Yuen Club.

The prosecution supplied the background for this through the testimony of the witness George Gibbons, who testified to his trips to a number of places where, according to the prosecution's theory, gambling operations were being conducted by appellant in 1945. His testimony on direct examination was vague and rambling (Tr. 194-203). On cross-examination he refused to state positively he went to Watsonville, Alviso and Bakersfield in 1945 (Tr. 213-4). He testified that he went to 3600 San Pablo Avenue but did not pick up or deliver any money (Tr. 201-2) and that he never visited the Hollywood Club (Tr. 206). There was no testimony of any gambling being conducted at any of these five places. A motion to strike this evidence, made orally (Tr. 1944), was denied (Tr. 1948).

The prosecution's witness Augustus Brady included all of the above and other places in his net worth analysis (Exh. 339) as gambling clubs, upon the basis of Gibbons' testimony, although he could point to no justification in the evidence, stating he made the entries pursuant to instructions of the prosecuting attorney (Tr. 1894-1903). Brady also included in Exhibit 339 an opening and closing item of $50,000 as bank roll or "cash for above clubs". He admitted that he was instructed to do this by the prosecuting attorney (Tr. 1896). He could find no justification for this in the evidence. The Overstreet testimony to which Brady referred in his chart (Exh. 339) pertained to the Wai Yuen cash in the sum of $47,259.40

seized by the authorities in a raid on the Wai Yuen Club on February 4, 1945. There was no evidence of the existence of a bank roll at December 31, 1945. The Wai Yuen Club was closed during the last three months of 1945 (Tr. 914). Finally, Brady did not take into account an increase of liabilities of the Wai Yuen Club of $16,000 during the year 1945, together with a liability for withholding tax in the sum of $5219.80, all of which appeared in the prosecution's own evidence (see Exh. 186—Balance Sheet as of December 31, 1945).

The charge to the jury.

In its charge to the jury, the Court gave certain instructions to which appellant duly objected (Tr. 2099, et seq.). The Court also failed to give certain instructions requested by appellant to which failure appellant duly objected (Tr. 2106, et seq.). Several of these (Nos. 45-55) pertained to the so-called net worth-expenditures method of proof.

SPECIFICATION OF ERRORS.

Specification No. 1.

The Court erred in denying appellant's written motion (Tr. 15) made at the conclusion of the Government's case in chief (Tr. 1944, 1948) to strike the testimony of the witness William A. Wallace, given on direct examination, in respect to twenty partnership returns of income, which said witness had been employed and paid by appellant to prepare, that he had

received instructions from appellant to report on said returns the division of income into partners shares, the said witness further testifying on cross-examination (Tr. 1294) that he did not personally receive any information about the partners shares from appellant and was not present on any occasion when it was received by any one else, appellant's grounds for said motion and objection to the admission and retention of said evidence and which the Court denied being "that such testimony is incompetent, conclusions and opinions of the witness and hearsay" (Tr. 15).

Specification No. 2.

The Court erred in denying appellant's oral motion, made during the redirect examination of the witness William A. Wallace (Tr. 1410-11), to strike the testimony of said witness given on such redirect examination, in respect to the 1945 partnership return of income of the Admay Co. (Exh. 13) that the distribution of partnership income on said tax return came from appellant since "it is usually the procedure to have Mr. Chin indicate who the partners are", although said witness stated he did not talk with appellant personally, appellant's grounds for said motion and objection to the admission and retention of said evidence and which the Court denied being that the testimony was "speculative, and hearsay as to the defendant, irrelevant and immaterial in this case" (Tr. 1410-11).

Specification No. 3.

The Court erred in denying appellant's written motion (Tr. 15) made at the conclusion of the Government's case in chief (Tr. 1944, 1948) to strike the testimony of the witness William A. Wallace given on direct examination, in respect to four 1945 individual returns of income for four of appellant's children, which said witness had been employed and paid by appellant to prepare, that he had received from appellant information and instructions as to the income to be reported on said returns (excepting farm, professional and salary items) (Tr. 1109-17), the said witness further testifying on cross-examination (Tr. 1290-93) that he did not personally receive any information or instructions from appellant with respect to such items of income and was not present on any occasion when information or instructions were received by anyone else, appellant's grounds for said motion and objection to the admission and retention of said evidence and which the Court denied being "that such testimony is incompetent, conclusions and opinions of the witness and hearsay" (Tr. 15).

Specification No. 4.

The Court erred in denying appellant's oral motion made during the redirect examination of the witness William A. Wallace (Tr. 1412) to strike the testimony of said witness given on such redirect examination, in respect to the 1945 individual return of income of appellant's son (Exh. 23), that a deduction for depreciation taken thereon, "was evidently directed to Mr

Peffers when he prepared the return'', although said witness admitted not having ''any direct knowledge'', appellant's grounds for said motion and objection to the admission and retention of said evidence, and which the Court denied, being ''hearsay as to the defendant, speculative'' (Tr. 1412).

Specification No. 5.

The Court erred in denying appellant's oral motion made during the redirect examination of the witness William A. Wallace (Tr. 1413) to strike the testimony of said witness given on such redirect examination, in respect to the 1945 partnership return of income of the Admay Co. (Exhibit 20), that a deduction for depreciation taken thereon ''was directed apparently by Mr. Chin to our Mr. Peffers'', the witness stating ''nobody directed me personally'', appellants grounds for said motion and objection to the admission and retention of said evidence, and which the Court denied, being that such testimony was ''a conclusion and opinion of the witness and hearsay as to the defendant'' (Tr. 1413).

Specification No. 6.

The Court erred, during the direct and redirect examination of the witness William A. Wallace, in admitting in evidence, over appellant's objections, and in refusing to strike, testimony of the witness that a certain Accounts Payable No. 20 on the books of the Gerdon Land Co. represented a liability to one person who was appellant, appellant's objections to the ad-

mission of such evidence and which the Court overruled, being that "the books are the best evidence. It calls for the conclusion and opinion of the witness" and the appellant's grounds for said motion and objection to the admission and retention of such evidence and which motion the Court denied being: "One, it is the conclusion and opinion of the witness; second, it is hearsay" (Tr. 1124-5; 1366-67).

Specification No. 7.

The Court erred, during the direct and redirect examination of the witness James L. Wiley, in admitting in evidence, over appellant's objections, testimony of the witness that he identified Accounts Payable No. 20 on the books of the Gerdon Land Co. with, and in his report "attributed" said account to, appellant, appellant's objections to the admission of such evidence and which the Court overruled being that "it calls for an opinion and conclusion of the witness" and "the books are the best evidence as to whether they identify themselves with the defendant" and that the aforesaid report "is hearsay, not binding on this defendant" (Tr. 379-81; 478-9).

Specification No. 8.

The Court erred, during the direct examination of the witness Liston O. Allen, in admitting in evidence certain cancelled checks of the Gerdon Land Co., payable to the order of appellant (Exh. 92-95, 247-8) appellants objection to the admission of such evidence, and which the Court overruled being that such exhibits

were "irrelevant and immaterial, not within or connected up with the issues of this case, pertains to the year 1946" (Tr. 683, 684, 686, 687, 688), "incompetent, irrelevant and immaterial, not binding upon this defendant, not within the issues of this case or connected up with the issues of this case" (Tr. 690).

Specification No. 9.

The Court erred, during the redirect examination of the witness William A. Wallace, in permitting the prosecution to impeach its own witness by interrogating said witness in respect to excerpts from a prior sworn statement given by him to the Intelligence Unit, the substance of which excerpts being that Wallace had had no discussions about the filing of a certain partnership return of income in 1946 and was not consulted about the income tax problems pertaining to said return, Wallace having testified previously thereto on cross-examination (Tr. 1261) that he had had conferences with a revenue agent and had thereafter consulted with appellant about a 1946 partnership return of income, appellant's objections to the admission of such evidence and which the Court overruled, being "that it is an attempt by the Government to impeach their own witness, and that no proper or adequate foundation has been laid" (Tr. 1415-20).

Specification No. 10.

The Court erred, during the direct examination of the witness Evelyn Lee Chang in admitting in evidence over appellant's objection, and in denying appellant's written motion (Tr. 16) made at the con-

clusion of the Government's case in chief (Tr. 1944, 1948) to strike, certain documents pertaining to transactions had in respect to a bank account of the witness and her husband at the Pacific National Bank (Exh. 163, 230-35, 239-41 incl. and 243) purporting to include transactions had in respect to the purchase of property located at 5000 Broadway, Oakland, and further in denying appellant's above motion to strike the testimony of said witness given on direct examination in connection with said exhibits and the transactions relating thereto, appellant's objection to the admission of such evidence, and grounds for said motion being that all of the same is "irrelevant, immaterial and not within or connected up with the issues of this case" (Tr. 16, 1494-1502).

Specification No. 11.

The Court erred in denying appellant's written motion (Tr. 16) made at the conclusion of the Government's case in chief (1944, 48) to strike the testimony of the witness L. F. Clarke, given on direct examination, pertaining to the Pacific National Bank Trustee Account of Howard and Evelyn Lee Chang, appellant's grounds for said motion and objection to the admission and retention of such evidence being that it is "irrelevant, immaterial and not within or connected up with the issues of this case" (Tr. 16, 1457-1461).

Specification No. 12.

The Court erred in denying appellant's written motion (Tr. 15-16) made at the conclusion of the Gov-

ernment's case in chief (Tr. 1944, 1948) to strike the testimony of the witnesses Dana E. Bremner, Leon C. Banker and Norman Ogilvie in respect to the purchase, financing and escrowing of the property located at 5000 Broadway, Oakland, appellant's grounds for said motion and objection to the admission and retention of such evidence being that it is "irrelevant, immaterial, and not within or connected up with the issues of this case" (Tr. 15-16; 238-246; 704-706; 720-723).

Specification No. 13.

The Court erred in denying appellant's oral motion made at the conclusion of the Government's case in chief (Tr. 1944, 1948) to strike the testimony of the witness George Gibbons, given on direct examination that said witness made certain trips at appellant's direction to Watsonville, Bakersfield, Alviso, Yosemite Club, Hollywood Club, 3600 San Pablo Ave. and The Palms, appellant's grounds for such motion and objection to the admission and retention of said evidence, and which the Court overruled, being that "such evidence is irrelevant and immaterial and has not been connected up with the issues of this case, and in form vague and speculative, and of such a character as to have no probative value in this case" (Tr. 1944-5; 1948; 194-203).

Specification No. 14.

The Court erred, during the direct examination of the witness Augustus V. Brady in admitting in evi-

dence over appellant's objection, and in refusing to strike (Tr. 17, 1944, 1948), Government's Exhibits 280-82 incl., 337-342 incl., 344, 345 and 347, and in admitting in evidence, over appellant's objection the testimony of said witness in purported explanation and elaboration of said exhibits, appellant's objection to the admission of such evidence and which the Court overruled being that "the document is improper and should not be admitted because it is based upon assumptions of fact or inferences from facts which are not in evidence" and "that this document is incompetent, irrelevant and immaterial, prejudicial, and basis for improper examination of the witness". The above objection was made to Exhibit 337, the first of said exhibits offered, the court permitting appellant's counsel to make the same objection by reference, upon the offer of the remaining exhibits above mentioned, as well as to the testimony of the witness pertaining thereto (Tr. 1802-47).

Specification No. 15.

The Court charged the jury as follows (Tr. 2082):

> "You are instructed that when in a trial on charges of income tax evasion discrepancies between the defendant's returns and his actual income are indicated by the Government's proof, the failure of the defendant to offer explanation in any form may be considered by you in arriving at your verdict."

This was instruction No. 5 as requested by the Government (Tr. 23), to which counsel for the appellant

made timely objection (Tr. 2099), stating the following grounds (Tr. 2100):

> "With respect to Instruction No. 5, that such instruction omits language from the case noted in support thereof to the effect that the burden of proof in the criminal case is always on the Government and never shifts. Furthermore, the giving of such instruction in its present form would permit the jury to draw an unfavorable inference from the defendant's failure to testify in the case at bar * * * "

Specification No. 16.

The Court refused to charge the jury in accordance with the appellant's requested instructions Nos. 45 through 55 (Tr. 64-72), except that a portion of No. 53 was given pertaining to the net worth-expenditures method of establishing taxable income. These instructions, for convenience, are set forth in the Appendix hereto at p. x et seq.

The appellant made timely objection to the court's refusal (Tr. 2106), stating the following grounds (Tr. 2107):

> "With respect to requested instructions Nos. 44 through 55, the additional specification is made that the omission from the charge to the jury of each of said instructions leave the jury without a full, clear or accurate instruction upon the legal principles pertaining to the so-called net worth expenditures method of computing income.
>
> "The jury cannot rely upon the testimony of witnesses for an explanation of the legal criteria on this subject, and cannot resort to the testimony

of accountants for the standards of law. Net worth expenditures evidence is circumstantial evidence and the jury must be instructed upon the pertinent legal principles so that such instruction can be coordinated with the general instructions on circumstantial evidence.

"The jury must be instructed on the type and quantum of proof required by the net worth expenditures method under law, so that it can apply such principles in following the Court's charge on the reasonable hypothesis doctrine. The Court must point out to the jury in its charge, the legal principle that at no time under the net worth expenditures method does the burden of proof from the Government, nor is it altered or changed in any way.

"The Court must, we respectfully urge, instruct the jury upon the legal standards pertaining to the important factors of this net worth, among which are: the starting point, the opening net worth, the increase, and other factors as set forth in the proposed requested instructions of the defendant."

Specification No. 17.

The Court charged the jury as follows (Tr. 2082):

"The possession of money alone is not sufficient to establish net taxable income. That evidence of the possession of money and the expenditure of money may be considered as part of a chain of circumstances which you may consider in arriving at a conclusion as to whether or not the defendant enjoyed taxable income."

This was instruction No. 4 as requested by the Government (Tr. 23), to which counsel for the appellant

made timely objection (Tr. 2099), stating the following grounds (Tr. 2100):

> "With respect to Instruction No. 4, the second sentence thereof is not a correct statement of law and is not supported by legal authorities, and the instruction does not specify the chain of circumstances referred to therein."

Specification No. 18.

The Court charged the jury as follows (Tr. 2087):

> "Evidence has been admitted in the trial of this case as to the practice of gambling during the year 1945 on the premises controlled by defendant, and evidence has been admitted that the defendant received income from the practice of gambling during 1945 on which he paid no tax.
>
> "Such evidence, if believed, may be considered by you only for the limited purposes of showing that defendant had a source of income from an illegal business which he concealed from the tax authorities. It may be considered by you to show that the defendant had a plan or scheme of operation in prior years resulting in income to the defendant continuing over to and similar to that used in 1945, and to show the intent of the defendant to defraud the Government of income taxes during the year 1945."

This was instruction No. 29 as requested by the Government (Tr. 31), to which counsel for the appellant made timely objection (Tr. 2099), stating the following grounds (Tr. 2101-2102):

> "With respect to Instruction No. 29, the first paragraph of said instruction is not based upon

the evidence in the record, and the second paragraph of said instruction is not logically related to or connected with the first paragraph. Furthermore, such instruction is generally ambiguous and confusing and does not accurately set forth the law."

Specification No. 19.

The Court charged the jury as follows (Tr. 2089-2090):

> "The word 'wilful' when used in a criminal statute generally means an act done with a bad purpose; without justifiable excuse; or stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by a careless disregard whether one has the right so to act."

This was instruction No. 49 as requested by the Government (Tr. 35), to which counsel for the appellant made timely objection (Tr. 2099), stating the following ground (Tr. 2102-2103):

> "With respect to Instruction No. 49, upon the ground that the last sentence of said instruction does not accurately state the law."

Specification No. 20.

The Court charged the jury as follows (Tr. 2083):

> "The duty to file the return is personal, and it cannot be delegated. Bona fide mistakes should not be treated as false and fraudulent, but no man who is able to read and write and who signs a tax return is able to escape the responsibility of at least good faith and ordinary diligence as to the

correctness of the statement which he files, whether prepared by him or prepared by somebody else."

This was instruction No. 10 as requested by the Government (Tr. 25), to which counsel for the appellant made timely objection (Tr. 2099), stating the following ground (Tr. 2100-2101):

> "With respect to Instruction No. 10, said instruction sets up an improper standard of conduct, namely, standard of 'good faith and ordinary diligence' as the 'responsibility' of every person who can read and write. Failure to conform to such standard does not necessarily constitute a crime."

Specification No. 21.

The Court erred in denying appellant's motion for a new trial (Tr. 76, 82).

ARGUMENT.

I. INSTRUCTIONS TO JURY, GIVEN AND REFUSED.

It is our contention that the trial Court committed a number of errors in giving certain instructions to the jury, over the appellant's objections, in refusing to give certain instructions requested by the appellant, and in giving instructions which as a whole were unbalanced, and that these errors were highly prejudicial to the appellant.

1. **The Court erred to the prejudice of the appellant in instructing the jury that the failure of the defendant to offer explanation of the Government's evidence might be considered by the jury in arriving at their verdict** (Specification No. 15).

The Court charged the jury as follows (Tr. 2082):

> "You are instructed that when in a trial on charges of income tax evasion discrepancies between the defendant's returns and his actual income are indicated by the Government's proof, the failure of the defendant to offer explanation in any form may be considered by you in arriving at your verdict."

To this instruction, which was No. 5 as requested by the Government (Tr. 23), counsel for the appellant made timely objection, specifically stating his grounds therefor, including the ground that the instruction "would permit the jury to draw an unfavorable inference from the defendant's failure to testify" (Tr. 2100).

The giving of this instruction, we submit, was a serious violation of the fundamental rights secured to the appellant by federal statute and by the Fifth Amendment to the Constitution.

The Fifth Amendment provides, in part, that "No person * * * shall be compelled in any criminal case to be a witness against himself * * *" (U.S.C.A., Const. Amend. 5). This language, of course, embodies the traditional privilege against self-incrimination as developed in the common law. *Wigmore on Evidence,* 3rd Ed., vol. 8, Sec. 2252.

The statute involved is Section 3481 of Title 18, U.S.C.A., formerly Section 632 of Title 28, U.S.C.A.

(Act of March 16, 1878, 20 Stat. at L. 30, chap. 37), and it provides as follows:

> "In trial of all persons charged with the commission of offenses against the United States and in all proceedings in court martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

This statute was enacted in substantially its present form in 1878 for the purpose of removing the common law disability of the accused from testifying in his own defense. But it goes beyond that purpose. Not only does it confer testimonial competency upon the accused, but also, it gives assurance that no presumption shall arise against him from his failure to testify. Thus, if the accused elects not to exercise his privilege to testify, but instead, relies upon his constitutional privilege against self-incrimination, the statute expressly declares that he shall suffer no adadverse inference from his exercise of the latter privilege. As aptly stated by the Supreme Court, "But Congress coupled his privilege to be a witness with the right to have a failure to exercise the privilege not tell against him." *Bruno v. United States* (1939), 308 U.S. 287, 292, 60 S. Ct. 198, 84 L.Ed. 257, 260.

Apart from the statute, it is our contention that the Fifth Amendment likewise protects the accused from any unfavorable inference which might arise from

his failure to testify. While the amendment does not say this in so many words, as does the statute, it seemingly affords the same protection to the accused by necessary implication. The reasoning in support of such view is well stated by Justice Murphy in his dissenting opinion in *Adamson v. California* (1947), 332 U.S. 46, 124, 67 S.Ct. 1672, 91 L.Ed. 1903, 1947, 171 A.L.R. 1223, as follows:

> "If he does not take the stand, his silence is used as the basis for drawing unfavorable inferences against him as to matters which he might reasonably be expected to explain. Thus he is compelled, through his silence, to testify against himself. And silence can be as effective in this situation as oral statements."

The question whether the Fifth Amendment in this respect affords the same protection as the statute has apparently never been passed upon by the Supreme Court. In light of the statute the question may never arise, and it would seem to be academic insofar as the present case is concerned. Before leaving the matter, however, we wish to make further reference to the *Adamson* case, supra.

In that case the Court was called upon to consider the validity of an amendment to the Constitution of the State of California, adopted in 1934, which provided that "in any criminal case, whether the defendant testifies or not, his failure to explain or deny by his testimony any evidence or facts in the case against him may be commented upon by the Court and by counsel, and may be considered by the Court or the

jury * * *''* In holding that this provision was not proscribed by the Fourteenth Amendment, the majority of the Court said (322 U.S. 50-51):

> "We shall assume, but without any intention thereby of ruling upon the issue, that permission by law to the court, counsel and jury to comment upon and consider the failure of defendant 'to explain or to deny by his testimony any evidence or facts in the case against him' would infringe defendant's privilege against self-incrimination under the Fifth Amendment if this were a trial in a court of the United States under a similar law. Such an assumption does not determine appellant's rights under the Fourteenth Amendment. It is settled law that the clause of the Fifth Amendment, protecting a person against being compelled to be a witness against himself, is not made effective by the Fourteenth Amendment against state action * * *"

In a concurring opinion, Justice Frankfurter said (322 U.S. 61):

> "For historical reasons a limited immunity from the common duty to testify was written into the Federal Bill of Rights, and I am prepared to agree that, as part of that immunity, comment on the failure of an accused to take the witness stand is forbidden in federal prosecutions. It is so, of course, by explicit act of Congress (March 16, 1878) 20 Stat 30, c 37, 28 U.S.C.A. § 632, 8 FCA

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*California is one of the few States which permit an adverse inference to be drawn from the failure of the accused to testify. "Generally, comment on the failure of the accused to testify is forbidden in American jurisdictions . . ." *Adamson v. California*, supra, 322 U.S. 46, 55; see, also, *Wigmore on Evidence*, supra, Sec. 2272.

title 28, § 632; see *Bruno v. United States,* 308 US 287, 84 L ed 257, 60 S Ct 198."

Two of the four dissenting justices (Black and Douglas) adopted the same assumption as the majority with reference to the scope of the Fifth Amendment (322 U.S. 69), and the other two dissenting justices (Murphy and Rutledge) declared flatly that "this guarantee against self-incrimination has been violated in this case" (322 U.S. 124-125).

Thus all of the justices in the *Adamson* case either assumed or held that the amendment to the State Constitution infringed upon the defendant's privilege against self-incrimination under the Fifth Amendment.

Whether or not the Fifth Amendment prevents the drawing of an adverse inference from the fact that the privilege against self-incrimination is claimed, the statute itself is explicit. It restrains both the Court and the prosecutor from making any comment upon the failure of the accused to testify. *Wilson v. United States* (1893), 149 U.S. 60, 13 S.Ct. 765, 37 L.Ed. 650; *Johnson v. United States* (1942), 318 U.S. 189, 63 S.Ct. 549, 87 L.Ed. 704; see also, *Adamson v. California,* supra, 322 U.S. 46, 50, footnote 6, 91 L.Ed. 1903, 1907. Furthermore, if the accused so requests, he is entitled to an instruction charging the jury, in line with the statute, that his failure to testify shall not create any presumption against him, and the refusal to give such an instruction is reversible error. *Bruno v. United States,* supra.

To "consider" adversely "the failure of the defendant to offer explanation", as the jury here were permitted to do, is to create a "presumption" against him, within the meaning of the statute. The broad meaning of the term "presumption", as used in the statute, is made evident by the Supreme Court's decision in the *Bruno* case, supra. In that case Bruno and others were convicted of a conspiracy to violate the narcotics laws. Some of his codefendants took the stand, but Bruno did not. The following instruction, requested by him, was refused (308 U.S. 292):

> "The failure of any defendant to take the witness stand and testify in his own behalf, does not create any presumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against any such defendant, nor should this fact enter into the discussions or deliberations of the jury in any manner."

The Supreme Court, in reversing the conviction, held that the defendant had "an indefeasible right to have the jury told in substance what he asked the judge to tell it" (308 U.S. 292).

It will be noted that the charge in the *Bruno* case told the jury not only that the failure of the defendant to testify does not create any "presumption" against him, but that the jury "must not permit that fact to weigh in the slightest degree" against the defendant, nor should such fact "enter into the discussions or deliberations of the jury in any manner." In effect, the jury were instructed not to "consider" for any purpose or in any manner the fact

that the defendant chose not to testify. They were admonished not even to mention such fact in their deliberations.

To read the statute, and then to read the Court's charge to the jury in the present case, is enough to demonstrate that the instruction is condemned by the statute. The statute says that the failure of the defendant to testify "shall not create any presumption against him." The jury were told that "the failure of the defendant to offer explanation in any form may be considered by you in arriving at your verdict." Granting that the Court did not mean by this that the jury might base its verdict solely upon the failure of the defendant to testify—that is, entirely without regard to the Government's evidence—the instruction undoubtedly permits the jury to give greater weight to the Government's evidence because of the defendant's failure to explain or deny it, and the burden of proof rests lighter upon the shoulders of the prosecutor. Without such added weight the Government's case might fall. The jury might not be prepared to accept the Government's evidence. It might not be willing to draw from such evidence an inference unfavorable to the defendant. It might be loathe to believe that he failed to report income, or that the omission of income from his tax return was wilful, or that he had a specific intent to evade the tax. It might not be satisfied of his guilt beyond a reasonable doubt. Without such added weight, the Government's proof might not be sufficient to tip the scales. Thus by the Court's instruction, the defendant's silence is made to speak against him. By

claiming his privilege against self-incrimination, he incriminates himself.

The prejudice to the defendant inherent in this instruction is emphasized by the fact that the charge is made applicable to virtually the whole of the Government's case. The evidence which the defendant is called upon to explain, in the words of the instruction, consists of "discrepancies between the defendant's returns and his actual income", meaning all such discrepancies which the Government tried to prove by whatever method of proof. If such discrepancies are "indicated" by the Government's proof, the jury is free to convict the defendant for his failure to explain or deny such "indications", regardless of whether that proof, in and of itself, would stand the test.

In support of its proposed instruction, as given by the Court, the Government cited the case of *Bell v. United States* (1950), 4 Cir., 185 F. 2d 302, cert. den. 340 U.S. 930, 71 S.Ct. 492, 95 L.Ed 671, and it does appear that the language of the instruction was taken from the Court's opinion in that case. But the *Bell* case, as we shall show, is plainly distinguishable from the present one and lends no support whatever to the Government's position here.

In the *Bell* case the defendant, as here, was indicted under Section 145(b) of the Internal Revenue Code. The Government's case, in the language of the Court, "consisted in part of estimates of the net income of the defendant in the taxable years based upon calculations of his net worth at the beginning and end

of each year derived from available records, and also statements of the defendant to the revenue agents who investigated the case'' (185 F. 2d 305). The revenue agents testified at some length regarding their conversations with the defendant, as well as with his auditor, during the course of the investigation, and the opinion of the Court makes repeated reference to such testimony. At the trial, however, the defendant did not take the stand, nor did he offer any witnesses in his behalf.

On the appeal from his conviction, the defendant questioned the sufficiency of the evidence to go to the jury, and urged, also, that ''the net worth statements are insufficient in themselves to prove his guilt and that in the absence of proof of the corpus delicti, a conviction of crime may not be based solely on the confessions or admissions of the defendant'' (185 F. 2d 309). In rejecting this contention, the Court said (185 F. 2d 309):

> ''In this case there is substantial evidence outside of Bell's statements to indicate his guilt. It consists of the increase in his net worth during the taxable years, the absence of personal records or books of account, and the inadequacy of the corporate records to show fully either its transactions or those of the defendant; and this body of testimony derives support from the defendant's failure to offset or explain the discrepancy through his employees either during the agent's investigation or the trial in court. It is true that the burden of proof resting upon the government does not shift during the progress of a criminal case but when in the trial of charges

of income tax evasion discrepancies between the taxpayers' returns and his actual income are indicated by the government's proof, the failure of the defendant to offer explanation in any form may be considered by the jury in finding its verdict. In *Rossi v. U. S.,* 289 U.S. 89, 91, 53 S. Ct. 532, 533, 77 L. Ed. 1051, the court said: 'The general principle, and we think the correct one, underlying the foregoing decisions, is that it is not incumbent on the prosecution to adduce positive evidence to support a negative averment the truth of which is fairly indicated by established circumstances and which, if untrue, could be readily disproved by the production of documents or other evidence probably within the defendant's possession or control.' See also, *Jelaza v. U. S.,* 4 Cir., 179 F. 2d 202; *U. S. v. Hornstein,* 7 Cir., 176 F. 2d 217, 220; *Bradford v. U. S.,* 5 Cir., 130 F. 2d 630."

It is at once apparent that the Court in the *Bell* case was considering, not the propriety of an instruction to the jury, but the sufficiency of the evidence. And the same is true of all of the cases cited in the above-quoted paragraph from the *Bell* case.

In the first case thus cited, *Rossi v. United States,* the defendants were convicted, in a non-jury trial, of violating the internal revenue laws by carrying on the business of a distiller without having given a bond as required by statute, and by having possession and control of a still without registering the same as required by law. The Government proved that the defendants had possession and control of the still, and that it was set up for operation in a dwelling house, but offered no affirmative evidence

to show that the defendants had failed to register the still or to give bond. The defendants did not take the stand. In holding that the evidence was sufficient to sustain the conviction, the Court called attention to another statute which prohibited the operation of a still in any dwelling house and observed that it "was impossible for petitioners lawfully to register the still or to give the required bond" (289 U.S. 91).

In the *Rossi* case, as in the *Bell* case, the Government's proof was *wholly uncontradicted,* and the Court merely held that in failing to offer any contrary evidence, the defendants must suffer whatever inferences may logically be drawn from the evidence against them.

Again in *Bradford v. United States,* likewise cited in the *Bell* case, the Court was considering the sufficiency of the evidence to support the conviction of one of the defendants, Will Bradford, who had elected not to testify. In affirming the conviction the Court said, in part (129 F. 2d 277-278):

> "These salient facts, standing out in the midst of many minor circumstances in evidence, were sufficient to require some contradictory or explanatory testimony (not necessarily by, but) in behalf of Will Bradford, or an inference of guilty knowledge reasonably could be drawn against him by the jury. The presumption of innocence is one of the strongest rebuttable presumptions known to the law, but it disappears when a verdict of guilty, supported by substantial evidence, is returned against the defendant."
>
> * * * * * * *

"No presumption against the accused arose from his not testifying in his own behalf, but his failure to testify did not raise a presumption in his favor or enable him to avoid the consequences of fair and reasonable inferences from proven facts."

Upon petition for rehearing, the Court specifically rejected the contention that in passing upon the sufficiency of the evidence it had indulged an unfavorable inference from the failure of the defendant to testify, saying (130 F. 2d 630):

"Notwithstanding the statements in the petition for rehearing filed on behalf of appellants, this court did not hold that an inference of guilty knowledge might be drawn against W. T. Bradford because he did not testify. Such an inference is not permissible under the law. Counsel have evidently misread our opinion in this case. No man may be compelled to be a witness against himself, but sometimes in the progress of a trial the burden of going forward with the evidence may require the accused to produce testimony for himself or suffer an inference of guilt from facts already proven to be drawn against him by the jury."

Similarly in *Jelaza v. United States* and *United States v. Hornstein,* also cited in the *Bell* case, the Courts were considering the sufficiency of the evidence. Moreover, in each of those cases the defendant had taken the stand, hence his testimony was subject to the same treatment as that of any other witness. In such cases the failure of the defendant in his testimony to explain or deny the evidence against him

which he might naturally have explained or refuted, may be considered by the Court or jury. Where the defendant elects to testify in his own behalf, he waives his privilege against self-incrimination, and the "prohibition against inferences from his failure to testify comes to an end, with the ending of the privilege." *Wigmore on Evidence, supra,* sec. 2273, p. 433, see also, *Caminetti v. United States* (1916), 242 U.S. 470, 37 S.Ct. 128, 61 L.Ed. 442.

It thus appears that the Court in the *Bell* case, in referring to "the failure of the defendant to offer explanation in any form", was discussing the sufficiency of the evidence, and that by this language the Court was merely pointing out that defendant had failed to put on evidence of any kind and that the Government's proof was uncontradicted.

Furthermore, it was possible under the circumstances of the *Bell* case, as is plainly evident from the opinion, for the defendant to furnish some explanation of the Government's evidence in a form other than his own personal testimony. As the Court observed, after adverting to the evidence "outside of Bell's statements" made to the internal revenue agent, "this body of testimony derives support from the defendant's failure to offset or explain the discrepancy *through his employees* either during the agent's investigation or the trial in court" (185 F.2d 309; emphasis ours). Such a comment was obviously proper, since it did not pertain to the personal testimony of the defendant. "The *failure to produce evidence,* in general, *other than his own testimony,* is open to in-

ference against a party accused, with the same limitations * * * applicable to civil parties." *Wigmore on Evidence,* supra, sec. 2273, p. 427. In civil cases, of course, "A party's failure to produce evidence which, if favorable, would naturally have been produced, is open to the inference that the facts were unfavorable to his cause." *Wigmore on Evidence,* supra, sec. 2273, p. 426. But this rule must yield in criminal cases wherever it comes into conflict with the privilege against self-incrimination. Hence, in such cases it applies only to the failure of the accused to produce evidence other than his own testimony or private papers. *Wigmore on Evidence,* supra, sec. 2273.

In the present case the Court's charge to the jury was not confined to any legitimate inference which might be drawn from the failure of the appellant to produce available non-privileged evidence. Nor may it be construed to mean merely that the appellant had failed to put on any evidence at all. As a matter of fact, the appellant here, unlike the defendant in the *Bell* case, did produce witnesses in his behalf, and, in addition, he introduced documentary evidence. For that reason alone the language of the instruction, while the same as that employed by the Court in the *Bell* case, cannot possibly have the same meaning. In the *Bell* case, in which the defendant produced no evidence whatever and the Court was considering the sufficiency of the evidence against him, "the failure of the defendant to offer explanation in any form" meant the failure of "the defense" to introduce evidence of any kind or character. In the present case,

in which the appellant did produce evidence, "the failure of the defendant to offer explanation in any form" can only refer to the failure of the defendant personally to take the stand. Thus the words of the *Bell* case, considered in their context, mean one thing, but when torn from their natural environment and thrust into a different one, they take on a different meaning.

Moreover, we must not lose sight of the fact that the instruction specifically refers to *the defendant.* It speaks of "the failure of the defendant to offer explanation in any form", meaning the failure of the defendant personally to offer any explanation at all. The instruction does not say "the failure of the defendant through available witnesses to offer explanation". And such a meaning may not be read into the instruction without interpolating words which are not there. Finally, it should be noted that elsewhere in the instructions the jury were given the usual charge regarding the failure of either party to call available witnesses having knowledge of the facts (Tr. 2087-2088). In light of the latter instruction, the charge regarding the failure of the defendant to offer explanation must be construed as having reference solely to the explanation of the defendant personally.

It should be mentioned that the trial Court gave the jury the following instruction (Tr. 2076), which was a portion of Defendant's Requested Instruction No. 18 (Tr. 38):

> "Now, I instruct you, ladies and gentlemen, that within his option the defendant has the right,

under the law, to be sworn as a witness in his own behalf and testify, if he so chooses, or not as he may be so advised; and, therefore, as a matter of law, you as jurors, are not entitled to draw any inferences whatsoever against the defendant because he exercised his privilege, which is accorded to him under the law, of standing upon the case made against him by the Government, without being sworn and without testifying upon his own behalf."

This instruction, we contend, was emasculated by the erroneous charge considered hereinabove. In one charge the jury are told that they may draw no inference from the defendant's failure to testify, and in the other they are told that in arriving at their verdict they may consider the failure of the defendant to explain the Government's evidence. We submit that these instructions are patently incompatible, and that in giving the erroneous charge the Court deprived the appellant of the proper one.

As we have seen, the statute (18 U.S.C.A., Sec. 3481) is mandatory, and the accused has an "indefeasible right" to have the jury instructed in conformity with it. *Bruno v. U. S.*, supra. Here the Court gave the instruction, then, in effect, took it away. This is not the full measure of protection to which the appellant was entitled under the statute. It is to be noted, further that the correct charge here was given shortly after the Court commenced its instructions to the jury, and the erroneous charge was given somewhat later. As a result the first instruction was erased and superseded by the later one.

In *United States v. Ward* (1948), 3 Cir., 168 F.2d 226, three defendants were convicted on charges of defrauding the Government. In reversing the convictions the Court held, in part, as follows (pp. 227-228):

> "In the course of his charge the Trial Judge commented upon the failure of the defendants to take the stand in their own behalf. He said: 'That is another one of their rights as free Americans,—nobody can compel them; they can elect to rest their case without offering that much testimony (snap) and no inference of guilt can be drawn from that fact, that they did not take the stand * * *.'
>
> "Then the Judge went on to say: 'but, by the same token, you can weigh in your mind the fact that they did not with everything else heretofore said to satisfy you of their guilt.' We do not see how any jury could hear this part of a charge or how an appellate court could read it without coming to the conclusion that what the learned Trial Judge told the jury was that defendant did not have to offer any proof of his innocence but that if he did not take the stand the jury could consider that fact along with the prosecution's testimony upon the question of the defendant's guilt. Such a proposition of law is so clearly contrary to the authority in the federal cases that we need do no more than cite former adjudications in which the rule laid down is contrary to that contained in the excerpt from the charge above quoted. *Bruno v. United States,* 1939, 308 U.S. 287, 60 S.Ct. 198, 84 L.Ed. 257; *Wilson v. United States,* 1893, 149 U.S. 60, 13 S.Ct. 765, 37 L.Ed. 650; see *Johnson v. United States,* 1943, 318 U.S. 189, 195-199, 63 S.Ct. 549, 87 L.Ed. 704.

> "Counsel for the defendants seem to have missed this point completely and only bring it to us upon appeal in connection with a matter of less importance. But the language is there in the charge and we know it is there and it seems to us one of those misstatements of law into which all of us sometimes fall. It is, likewise, of substantial importance on the defendants' rights. Ordinarily, unless one complains of a proposition in a charge and gives the Trial Judge a chance to correct it, the reviewing court will not examine the legal accuracy thereof. But the error here is not mere inaccuracy but one 'affecting substantial rights' and the omission of counsel to note it does not relieve this Court of its responsibility to do so."

In the *Ward* case, as here, the Court gave an instruction under the statute then, in effect, destroyed it. Cf. *Cummings v. Pennsylvania R. Co.* (1930), 2 Cir., 45 F.2d 152. And the error was held to be so grievous that the convictions were reversed on appeal despite the failure of counsel for the defendants to make any objection to the charge in the trial Court. In the present case, as mentioned hereinabove, counsel for the defendant made timely objection to the charge, specifically stating the ground that the instruction "would permit the jury to draw an unfavorable inference from the defendant's failure to testify" (Tr. 2100). The trial Court, nevertheless, refused to give a curative instruction, and made no effort to clarify the apparent conflict in the instructions given. Under the circumstances, it is our position that this Court should not hesitate to reverse the conviction in this case.

In *Langford v. United States* (1949), 9 Cir., 178 F.2d 48, this Court had occasion to consider the effect of the statute (18 U.S.C.A., Sec. 3481) as applied to certain improper remarks made by the prosecutor in his argument to the jury. In affirming a judgment of conviction, the Court was of the opinion (1) that the remarks of counsel were not made in such manner "as would be likely to lead the jury to draw improper inferences" (p. 55); (2) that the Court had, in effect, instructed the jury to disregard such remarks; and (3) that "any error in this respect could be, and was, waived by the failure of defendant's counsel to object" (p. 55).

In contrast to the *Langford* case, we have here a case in which (1) the instruction of the Court was avowedly intended to permit the jury to draw improper inferences; (2) the Court made no pretense of correcting the erroneous instruction; and (3) counsel for the appellant made timely and pointed objection to the Court's charge. As applied to the present situation, the reasoning of the Court in the *Langford* case would seem clearly to require a reversal.

It is important to note, also, that the trial Court in the *Langford* case give the jury an instruction regarding the defendant's failure to testify. That instruction, to which counsel for the defendant made no objection, fell short of the standard set in the *Bruno* case, supra. As this Court said (p. 54):

> "* * * The general import of the instruction given was that defendant's failure to testify cannot supply anything lacking in the government's

case. There remains the possibility that the jury, in obedience to the instruction, might require the government to furnish proof of every essential fact, and still consider that the failure of defendant to testify added weight to such proof."

This Court then went on to say, significantly, that (p. 55) "Had defendant saved the point by proper objection the instructions given would not have cured the error"—that is, the error resulting from the prosecutor's improper remarks to the jury. In the present case, as we have observed, the appellant's point was saved by proper objection, and the Court made no effort whatever to "cure" the error.

The fact that the trial Court here had previously given the jury a proper instruction under the statute affords no consolation to the appellant and no legal justification for the wrongful charge. This is not a case in which the judge or the prosecutor says the wrong thing and then the judge tries to make amends. Here the right charge came first and the wrong charge followed somewhat later. If either of these two conflicting instructions were to be regarded as corrective or amendatory, the last one, as a matter of logic, would prevail.

It is entirely possible that a jury, in the present situation, would attempt to reconcile the two instructions by taking the view that despite the broad admonition contained in the first one—which stated in general terms that the jury were not entitled to draw any inferences against the defendant because of his failure to testify—they might, nevertheless, in a case where

discrepancies between the defendant's returns and his actual income are indicated by the Government's proof, consider that the failure of the defendant to offer explanation "added weight to such proof". *Langford v. United States,* supra, at p. 54. At best, the jury "were left to take its choice between two inconsistent statements of the law, one of which was wrong, and one right." *Cummings v. Pennsylvania R. Co.,* supra, at p. 153. In any event the present case stands as if the first and proper charge had, though requested, never been given.

If the trial Court had refused to give the instruction requested by the appellant, a reversal would be inevitable. *Bruno v. United States,* supra. That, in effect, is what the Court did. If the appellant had an "indefeasible right" to a full and unfettered instruction in line with the statute, he had, we contend, an equal right not to have the Court give an instruction in derogation of the statute. And that, precisely, is what the Court did.

As the Supreme Court has said, "Where the departure is from a constitutional norm or a specific command of Congress", a reversal would seem to be the only means for preventing a deprivation of such fundamental rights. *Kotteakos v. United States* (1946), 328 U.S. 750, 764-765; 66 S. Ct. 1239, 90 L. Ed. 1557, 1566; see also, *Screws v. United States* (1945), 325 U.S. 91, 107, 65 S.Ct. 1031, 89 L.Ed. 1495, 1506.

2. The Court erred to the prejudice of the appellant in failing to instruct the jury as to the legal norms applicable to the net worth-expenditures method of establishing taxable income (Specification No. 16).

As noted hereinabove, one of the methods of proof by which the prosecution sought to establish its case was the so-called net worth-expenditures method. On this issue the Court charged the jury as follows (Tr. 2080):

> "We have heard a great deal about net worth during the trial of this case. The net worth-expenditures method of establishing net income, sought to be applied in this case, is effective only if the computations of net worth at the beginning and at the end of the questioned periods, can reasonably be accepted as accurate."

The last sentence of this instruction was a portion of appellant's requested instruction No. 53 (Tr. 70; see Appendix hereto, p. xvii), which was based upon *United States v. Fenwick* (1949), 7 Cir., 177 F.2d 488, 491. In the requested charge the portion thus given by the Court was preceded by the following:

> "* * * when the government relies upon the circumstances of increased net worth and expenditures in excess of reported income to establish income tax evasion it must produce evidence that excludes all possible available sources of taxable income from which the increased net worth and the excess expenditures could have been derived * * *"

As the trial Court observed, the jury "heard a great deal about net worth" (Tr. 2080) during the

trial. The evidence on this issue was voluminous, and much of it was complicated. It is our contention that the appellant was entitled to have the jury fully instructed as to the established legal criteria applicable to the net worth-expenditures method of proof. The instructions proposed by the appellant covered all aspects of this issue and were supported by citations of authority. All were refused except the single sentence from No. 53 referred to hereinabove.

The Court in its charge refers to the "net worth-expenditures method of establishing net income" without defining such method for the benefit of the jury. Nowhere in the Court's instructions do we find any explanation of these terms, despite the fact that the instructions repeatedly refer to the net worth-expenditures method. Thus the jury were charged that "Where a taxpayer's records are inadequate or inaccurate in substantial respects, the Courts have recognized that it is proper to determine taxable income by the net worth and expenditures method" (Tr. 2090). Again, "The Government has also sought to show by the net worth and expenditures method that the defendant fraudulently understated his net income and that of his wife for the year 1945 * * * It is sufficient to establish that part of the Government's case, if you find it has proved fraud by either method" (Tr. 2090-2091). In a case of such complexity it is unthinkable that all of the Government's evidence on the net worth-expenditures method should be submitted to the jury without any instructions as to how such evidence should be analyzed and applied. "In a crim-

inal case, it is always a duty of the Court to instruct on all essential elements of law, whether requested or not." *Morris v. United States* (1946), 9 Cir., 156 F.2d 525, 527. For an example of a recent case in which the jury were given instructions on various aspects of the net worth-expenditures method of proof, see *Pollack v. United States* (1953), 5 Cir., 202 F.2d 281, 285.

It is our contention that the brief instruction which the Court did give, as mentioned hereinabove, was more harmful to the appellant than would have been a total absence of any instruction on this subject, since the jury were told merely that the "computations" of net worth at the beginning and end of the questioned periods must be "reasonably" accurate. The jury should have been charged in accordance with other instructions proposed by the appellant, that such computations must be sufficient to establish a net worth increase beyond a reasonable doubt, and that such increase must reflect taxable income during the year in question.

It is a cardinal rule in cases of this kind that the Government's proof must exclude all income during the year in question which is derived from non-taxable sources. As this Court recently said in *Remmer v. United States,* decided May 28, 1953 (not yet reported), "where a person's net worth at the end of a particular year is greater than his net worth at the beginning of that year, and such increment is not attributable to gifts, devises, loans, or other non-income sources, an inference may be drawn that the

increase in net worth represents income to the taxpayer." Here the trial Court failed and refused to instruct the jury as to the necessity of eliminating all increment from non-income sources.

Furthermore, the Government's proof must exclude the hypothesis that the next worth increase can be explained in terms of prior accumulated assets. An increase in net worth may be treated as net income only if there is evidence of a starting point, at which time the taxpayer's assets can definitely be established, and evidence that the taxpayer had a source of income which would account for the increase in net worth. *Gleckman v. United States* (1935), 8 Cir., 80 F.2d 394; see also, Rothwacks, Criminal Tax Prosecutions, *Proceedings of New York University Eighth Annual Institute of Federal Taxation* (1950), at pp. 260-261. The starting point has been referred to as the cornerstone of a net worth case, and if that cornerstone is faulty the whole case for the Government falls. *United States v. Fenwick,* supra, at p. 492; see also, *United States v. Chapman* (1948), 7 Cir., 168 F.2d 997, 1001; *Bryan v. United States* (1949), 5 Cir., 175 F.2d 223; *Brodella v. United States* (1950), 6 Cir., 184 F.2d 823, 824. The present case involved a starting point at December 31, 1941, and an opening net worth at December 31, 1944, yet the Court gave the jury no instruction whatever as to the requirement of proving the starting point.

The instructions proposed by the appellant were intended, among other things, to define the starting point, to explain the necessity of adjusting the start-

ing point net worth in order to show the net worth at the beginning of the tax year in question, and to integrate the special criteria of a net worth case with the general instructions on circumstantial evidence and the burden of proof. In the absence of such instructions the appellant was exposed to the danger that the jury would accept the "explanations" of the Government's witnesses as announcing the law applicable to this phase of the case. The resulting prejudice to the appellant is readily apparent from the testimony which the Government was allowed to adduce from the witness Brady, who testified as to the Government's "computations" on the net worth-expenditures theory. The testimony of this witness will be dealt with hereinafter in considering the erroneous admission of evidence.

The prejudice to the appellant resulting from the lack of proper explanatory instructions on this vital issue was aggravated, we contend, by the two charges which are discussed next in order.

3. **The Court erred to the prejudice of the appellant in instructing the jury regarding evidence of the possession of money and the expenditure of money** (Specification No. 17).

The Court instructed the jury as follows (Tr. 2082):

> "The possession of money alone is not sufficient to establish net taxable income. That evidence of the possession of money and the expenditure of money may be considered as part of a chain of circumstances which you may consider in arriving at a conclusion as to whether or not the defendant enjoyed taxable income."

This instruction, we urge, was highly prejudicial to the appellant because it failed to specify the "chain of circumstances" which would have to be shown before the evidence of the possession and expenditure of of money could properly be considered by the jury. Obviously such evidence, standing alone, would have no probative value whatever. Yet the jury was given no hint as to what other circumstances would have to be proved before the mere possession and expenditure of money could have any bearing on the question "whether or not the defendant enjoyed taxable income."

If the Court, in spelling out the elements constituting an offense under Section 145(b) of the Internal Revenue Code, had omitted one or more of the statutory ingredients of the crime—such as wilfulness—there can be no doubt that a reversal would be required. That situation, we submit, is not far removed from the one which actually confronts us. Here the Court purported to instruct the jury concerning the factual links which, as part of a chain of circumstantial evidence, would tend to establish that the appellant enjoyed taxable income which he did not report during the year 1945; but only two of the links in that chain are specified. The others are missing. Still the jury are led to believe, by necessary implication, that such other links are to be found somewhere in the evidence. Did not the Court instruct them that they could consider this chain of circumstances? By failing to instruct fully on this matter, the Court virtually withdrew from the jury the right to pass upon the other

circumstances necessary to establish the existence of unreported income. Having undertaken to instruct the jury in the first place, the Court, we say, was under a duty to complete the task in order that the triers of the facts might know what facts to try.

The mystery which surrounds this "chain of circumstances" finds no solution elsewhere in the Court's instructions. We search in vain for any instructions on the net worth-expenditures method of proof, which, if given, might have furnished some clues to the missing circumstances.

Certainly the Court placed undue and prejudicial emphasis upon the particular circumstances mentioned in the charge. And this contributed to a lack of balance in the instructions as a whole, which will be discussed hereinafter.

4. **The Court erred to the prejudice of the appellant in instructing the jury as to the relevancy of evidence pertaining to the practice of gambling and the income therefrom during the year 1945** (Specification No. 18).

The Court charged the jury as follows (Tr. 2087):

> "Evidence has been admitted in the trial of this case as to the practice of gambling during the year 1945 on the premises controlled by defendant, and evidence has been admitted that the defendant received income from the practice of gambling during 1945 on which he paid no tax.
>
> "Such evidence, if believed, may be considered by you only for the limited purpose of showing that defendant had a source of income from an illegal business which he concealed from the tax authorities. It may be considered by you to show

> that the defendant had a plan or scheme of operation in prior years resulting in income to the defendant continuing over to and similar to that used in 1945, and to show the intent of the defendant to defraud the Government of income taxes during the year 1945."

The first paragraph of the instruction seems clear enough. The jury are told that there is evidence as to the practice of gambling during the year 1945 on premises controlled by the appellant, and as to the appellant's receipt of income from such gambling on which he paid no tax. The instruction then states that "such evidence" may be considered "only for the limited purpose" of showing that the appellant "had a source of income from an illegal business which he concealed from the tax authorities".

Assuming that there was such evidence in the record, it would not tend to show that the appellant concealed the source of such income. On the contrary, the appellant's returns for 1945, as well as other years, disclosed that a portion of his reported income was derived from gambling. (See Exh. 1-8 incl.) In addition, the partnership returns of the Wai Yuen Club for the years 1938 and 1939, on which the appellant was listed as a partner, reveal that the occupation of the club was "house of games". (See Exh. 48, 49).

The instruction next states that such evidence—that is, evidence of the practice of gambling in 1945 and income therefrom on which the appellant paid no tax —may be considered by the jury for purposes of showing that the appellant had "a plan or scheme of opera-

tion in prior years" resulting in income to him "continuing over to and similar to" the plan or scheme of operation used in 1945. It is difficult to conceive how evidence pertaining to the year 1945 could, without more, show a plan or scheme of operation in prior years. Moreover, even if we take the Court's word for that—as the jury was bound to do—we face the further question as to how or in what manner evidence of a plan or scheme of operation in prior years can affect the issue in this case, which is confined to the year 1945. The answer is, of course, that such evidence relating to prior years would be relevant only insofar as it might show the appellant's intent in 1945, which completes the process of reasoning in a circle and brings us back to the year 1945, our point of departure.

The Court then concludes the instruction by stating that such evidence—meaning, again, evidence of gambling in 1945 and income therefrom on which the appellant paid no tax—may be considered to show "the intent of the defendant to defraud the Government of income taxes during the year 1945".

If the foregoing analysis appears to be involved and obfuscated, it is so only because the Court's charge deserves the same characterization. Such an instruction could serve only to confuse the jury and to implant in their minds the impression that the appellant, in 1945 and prior years, was engaged in a clandestine and sinister enterprise which he tried to conceal from the Government in order that he might thereby evade his income tax.

If the Court intended this to be a so-called "source of income" instruction as an adjunct to the net worth-expenditures theory, such purpose should have been made clear to the jury. As has been indicated, an increase in net worth may be considered as net income only if there is evidence of a starting point, at which time the taxpayer's assets can definitely be shown, coupled with evidence that the taxpayer had a source of income which would account for the increase in net worth. Here, as we have seen, the Court gave no instruction whatever as to the necessity of proving a starting point, and in other respects the jury were not fully instructed regarding the elements of a net worth-expenditures case. Thus the jury were induced to consider the "source of income" instruction, not as a facet of the net worth-expenditures method, but as an independent matter. So considered, the instruction places an unnatural emphasis upon the nature of the business referred to therein, and encourages the jury to believe that the appellant *must have* evaded his income tax in 1945 *because* he was interested in certain gambling enterprises. This is borne out by the fact that the Court had previously given a similar charge (Tr. 2086) in which reference was made to a "source of unreported income" and a "scheme of conduct."

5. **The Court erred to the prejudice of the appellant in instructing the jury as to the standard for determining criminal intent** (Specifications Nos. 19 and 20).

The Court charged the jury as follows (Tr. 2089):

> "The word 'wilful' when used in a criminal statute generally means an act done with a bad

purpose; without justifiable excuse; or stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by a careless disregard whether one has the right so to act."

If the Court had stopped at the first semi-colon in this instruction, or perhaps at the end of the first sentence, we assume that the charge would have been proper. But when the Court went on, in the second sentence, to set up another and different definition of the word "wilful"—a definition which clearly does not fit the statute—it fell into serious error.

That the Court actually gave the jury at least two different meanings of "wilful" seems obvious from the language itself. And this conclusion is confirmed by a reference to the case of *United States v. Murdock* (1933), 290 U. S. 389, 54 S.Ct. 223, 78 L.Ed. 381, from which the language of the charge is derived. In that case the Supreme Court affirmed the reversal of a conviction under Section 1114(a) of the Revenue Act of 1926 and Section 146(a) of the Revenue Act of 1928 (forerunners of Section 145(a) of the Internal Revenue Code) because of the trial Court's refusal to instruct the jury that it should consider whether the defendant acted in good faith. In rejecting the contention that the word "wilful," as used in the statutes, "means no more than voluntarily", the Court said (290 U. S. 394):

"The word often denotes an action which is intentional, or knowing, or voluntary, as distin-

guished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose (*Felton v. United States,* 96 U. S. 699, 24 L.Ed. 875; *Potter v. United States,* 155 U. S. 438, 39 L.Ed. 214, 15 S.Ct. 144; *Spurr v. United States,* 174 U. S. 728, 43 L.Ed. 1150, 19 S.Ct. 812); without justifiable excuse (*Felton v. United States,* supra; *Williams v. People,* 26 Colo. 272, 57 Pac. 701; *People v. Jewell,* 138 Mich. 620, 101 N. W. 835; *St. Louis I. M. & S. R. Co. v. Batesville & W. Teleph. Co.,* 80 Ark. 499, 97 S. W. 660; *Clay v. State,* 52 Tex. Crim. Rep. 555, 107 S. W. 1129); stubbornly, obstinately, perversely, *Wales v. Miner,* 89 Ind. 118, 127; *Lynch v. Com.* 131 Va. 762, 109 S. E. 427; *Claus v. Chicago G. W. R. Co.* 136 Iowa, 7, 111 N. W. 15; *State v. Harwell,* 129 N. C. 550, 40 S. E. 48. The word is also employed to characterize a thing done without ground for believing it is lawful (*Roby v. Newton,* 121 Ga. 679, 49 S. E. 694, 68 L.R.A. 601), or conduct marked by careless disregard whether or not one has the right so to act, *United States v. Philadelphia & R. R. Co.* (D. C.) 223 Fed. 207, 210; *State v. Savre,* 129 Iowa, 122, 105 N. W. 387, 3 L.R.A. (N. S.) 455, 113 Am. St. Rep. 452; *State v. Morgan,* 136 N. C. 628, 48 S. E. 670."

The Court went on to adopt the "bad purpose" meaning as the test of wilfulness under the statutes then before it. In its opinion the Court made reference to its previous decision in *Felton v. United States* (1878), 96 U. S. 699, 24 L.Ed. 875, construing another revenue law, in which it was held that "an evil motive is a constituent element of the crime" (290 U. S. 395). The Court concluded by saying that while the

conduct of the accused "was intentional and without legal justification", the jury might nevertheless find that it "was not prompted by bad faith or evil intent, which the statute makes an element of the offense" (290 U. S. 397-398).

Later decisions of the Supreme Court have construed Section 145 (b) of the Internal Revenue Code as requiring proof of a specific purpose to evade tax. *United States v. Ragen* (1941), 314 U. S. 513, 62 S.Ct. 374, 86 L.Ed. 383; *Spies v. United States* (1943), 317 U. S. 492, 63 S.Ct. 364, 87 L.Ed. 418. See also, *United States v. Martell* (1952), 3 Cir., 199 Fed. 670; *Screws v. United States* (1945), 325 U. S. 91, 101, 65 S.Ct. 1031, 89 L.Ed. 1495, 1502; *Dennis v. United States* (1950), 341 U. S. 494, 499, 500, 71 S.Ct. 857, 95 L.Ed. 1137, 1147-1148. In the *Spies* case, supra, the Court, after reviewing the entire structure of sanctions, both civil and criminal, provided for the enforcement of the revenue laws, observes that "The climax of this variety of sanctions is the serious and inclusive felony defined to consist of wilful attempt in any manner to evade or defeat the tax" (317 U. S. 497). The Court refers to this felony as "the capstone" of this system of sanctions (317 U. S. 497), embracing "the gravest of offenses against the revenues" (317 U. S. 499), and requiring proof of a "tax-evasion motive" (317 U. S. 499).

In the language of the *Spies* case, "wilful, as we have said, is a word of many meanings" (317 U. S. 497). In the present case the Court should have confined its charge to the meaning of the term as used in

the statute here involved. Instead, the Court instructed the jury that "The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by a careless disregard whether one has the right so to act." This is not the standard of guilt prescribed by Section 145(b). It is not enough under that section for the prosecution to show that the accused acted without ground for believing that his conduct was lawful, or that he was careless as to whether he had a right to act as he did. The statute was not intended to impose punishment upon taxpayers who are merely careless or negligent. It requires proof of a bad purpose, an evil motive, a specific intent to evade the tax.

It is to be noted, also, that this error was magnified by repetition, since the jury were told elsewhere in the instructions that "no man who is able to read and write and who signs a tax return is able to escape the responsibility of at least good faith and ordinary diligence as to the correctness of the statement which he files" (Tr. 2083). Apart from the fact that the wording of this charge seems to place a burden of exculpation upon the accused—as if to say that he must prove his good faith and ordinary diligence—the Court's further reference to the test of due care was misleading and prejudicial.

While it is true that the Court in other portions of its charge told the jury that the prosecution must prove an intent to evade the tax, such instructions, we submit, were "watered down" by the erroneous instructions mentioned hereinabove. Instructions per-

taining to the subject of criminal intent are of the essence in a criminal case. They should be crystal-clear and they should not deviate from the statutory standard.

In *United States v. Martell,* supra, the Court charged the jury that "there is no wilfulness needed in an income tax case" (199 F.2d 671), but immediately thereafter stated that the burden of proof was on the Government to show that the defendant filed the return with a bad purpose. Upon the defendant's objection to the first part of the charge, the Court proceeded to give the following "curative" instruction (pp. 671-672):

> "In other words, members of the jury, I will read the precise language that the Supreme Court uses. The Supreme Court says: 'The Government must prove beyond a reasonable doubt the defendant with a bad purpose attempted to evade his tax. The jury can take all of the evidence into account to determine the defendant's intent or purpose.' * * * "

Despite this effort of the trial Court to correct the erroneous portion of the charge, the Appellate Court held that "the sum total of these instructions was to confuse the jury about what was required" (p. 672), and that "the probability of confusion was such as to create reversible error" (p. 672). The Court said (p. 672):

> "The rule concerning the state of mind required for conviction for this offense is discussed in *United States v. Murdock,* 1933, 290 U. S. 389, 394, 396, 54 S.Ct. 223, 78 L.Ed. 381, and *Hargrove*

> *v. United States,* 5 Cir., 1933, 67 F.2d 820, 823, 90 A.L.R. 1276. Willfulness is an essential element of the crime proscribed by §145(b). It is best defined as a state of mind of the taxpayer wherein he is fully aware of the existence of a tax obligation to the Government which he seeks to conceal. A willful evasion of the tax requires an intentional act or omission as compared to an accidental or inadvertent one. It also requires a specific wrongful intent to conceal an obligation known to exist, as compared to a genuine misunderstanding of what the law requires or a bona fide belief that certain receipts are not taxable. A conviction cannot be sustained unless this state of mind is supported by the evidence and explained to the jury."

In the present case the Court's instructions on this crucial subject of wilfulness were obviously conflicting, yet the Court made no attempt to correct the erroneous charge. Here the "probability of confusion" was no less evident than in the *Martell* case.

As was said in *Screws v. United States,* supra, "An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime * * * And that issue must be submitted to the jury under appropriate instructions * * * " (325 U. S. 101). In that case the Court reversed a conviction because of the failure of the trial Court to give a proper instruction on the meaning of the word "willfully" as used in the particular statute upon which the indictment was founded, saying (325 U. S. 107):

> "And where the error is so fundamental as not to submit to the jury the essential ingredients of the

> only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a Federal crime are entitled to be tried by the standards of guilt which Congress has prescribed."

In the present case the errors were detected by the appellant and called to the attention of the trial Court. Surely he was entitled to be tried by the measure of guilt which Congress has laid down.

6. The instructions, taken as a whole, were unbalanced and did not fairly present the issues.

As we have seen, the trial Court refused to instruct the jury as to the settled legal criteria applicable to cases involving the net worth-expenditures method of proof. On the other hand, the Court did give certain instructions requested by the Government which, though apparently related to the net worth-expenditures theory, were in no way identified with it. These were the instructions, discussed hereinabove, pertaining to the possession and expenditure of money, and to the practice of gambling and the income therefrom during the year 1945. Such instructions, however, were not only erroneous in themselves, but they disabled the jury from viewing the whole case in proper focus.

The prejudice to the defendant was intensified by other so-called "fact" instructions which tended to over-emphasize the particular circumstances posited in the charge—for example, the instruction regarding

the bonus checks issued to employees of the Wai Yuen Club (Tr. 2088-2089), and the instruction concerning partnership returns (Tr. 2089).

Against this background, the Court's instruction regarding the "failure of the defendant to offer explanation" of the Government's evidence looms large as a factor of prejudice.

It is our position that the rulings of the Court relating to the instructions, given and refused, were individually prejudicial, and that on the whole the instructions given were unbalanced and did not fairly orient the jury in this complicated case.

II. ERRORS IN ADMISSION OF EVIDENCE.

1. **The Court erred to the prejudice of the appellant in admitting in evidence testimony of the witness William A. Wallace in respect to information and instructions received from appellant in connection with the preparation of tax returns of which said witness had no testimonial knowledge** (Specifications Nos. 1, 2, 3, 4, 5).

(a) During the years 1941-1946, Wallace, who admitted he acted as appellant's tax consultant, prepared and filed with the Bureau of Internal Revenue numerous Federal tax returns. Included among these were twenty partnership returns of income (Exh. 13, 12, 68, 67, 66, 66A, 63, 15, 14, 17, 16, 70, 69, 19, 18, 62, 61, 20, 21 and 30—in the order of their appearance during his testimony; Tr. 1063-1105). Eight of the above twenty returns (Exh. 15, 17, 19, 20, 21, 30, 13, and BU) were for the year covered by the indictment, namely 1945. With the exception of the partnership returns of the Admay Co., which covered several hotel and apartment house operations conducted by that

partnership on real property leased to it by the Gerdon Land Co., so-called "Gerdon property", the above partnership returns generally reported the income and expenses pertaining to a single parcel of real property, admittedly owned by appellant (so-called "Chin property"). In 1945 six of the partnership returns covered "Chin" property and two covered operations on "Gerdon" property (Tr. 1182).

Wallace knew some of this real property was owned by appellant and some by Gerdon Land Co., and was aware of the fact that his office was reporting in partnership returns the income and expenses derived from them (Tr. 1180-83). But Wallace himself had nothing to do personally with the partnership accounts or appellant's personal matters of property (Tr. 1153-4). For some of these properties his office had been preparing partnership returns year after year (see Exh. 14, 16, 18, 61, 62, 66, 66A, 67-70, 318-324.) Information as to the amount of gross receipts or rentals derived from the properties was received by Wallace's office from real estate agents and persons other than appellant (Tr. 1173-6), as to the expense item of real property taxes from appellant's attorney, one Allen, who paid them (Tr. 1233) while the depreciation was calculated by Wallace's office. For the various hotels operated by the Admay Co., Wallace's office set up and maintained separate books (Exh. CL, CM, CN, CO and CP) in a manner and form according to Wallace's judgment (Tr. 1171).

In the light of the foregoing practices extending over several years, the conclusion is inescapable that

Wallace as a tax consultant and a practitioner enrolled before the United States Treasury Department (Tr. 1242) approved the reporting of this income on a partnership basis. He believed that Peffers, his assistant, considered these real estate operations as partnerships for tax and accounting purposes (Tr. 1244) and the record is bare of any indication of disagreement with the returns on Wallace's part. In fact when, in 1946, all of these partnerships were telescoped into one partnership (Exh. 63), he clearly appears in the role of a tax adviser, admitting at the same time that the idea of the new partnership for 1946 did not originate with appellant (Tr. 1260-65).

During the course of the Government's examination of this witness, he was asked from whom he received instructions as to the division of the income of these partnership returns or, as it was sometimes put, as to where he secured the information in respect to partners shares. In each instance, the witness named appellant as the person giving him such information or instructions (Tr. 1063-1105 passim). In connection with the 1945 partnership return of Admay (Exh. 13), Wallace, on redirect examination stated that "it is usually the procedure to have Mr. Chin indicate who the partners are" (Tr. 1411). On cross-examination Wallace admitted he had no personal knowledge of the communication of such information either to himself or others in his presence (Tr. 1294).

The Court's refusal to strike this evidence was erroneous. It is crystal clear that the witness had no "testimonial knowledge".

> "Courts have often uttered in broad terms the general principle of the necessity of Observation as a foundation for testimony * * * The first corollary from the general principle of Knowledge is that what the witness represents as his knowledge must be an impression derived from the *exercise of his own senses,* not from the reports of others, —in other words, must be founded on personal observation". (Wigmore on Evidence, 3rd Ed., vol. 2, sections 656, 657.)

In the words of the same authority (Wigmore on Evidence, 3rd Ed., Vol. 2, section 655, p. 759), "where the subsequent course of the examination develops a total lack of opportunity of knowledge, no doubt the testimony may be struck out".

This testimony was most prejudicial to appellant. The partnership issue came down to the question whether appellant with criminal intent to evade his taxes was arbitrarily directing the reporting of this real property income on a partnership basis and the improper "division" of it among partners, or whether this method of income reporting was adopted in good faith and after consultation with the tax adviser. Apparently, Wallace and his assistant Peffers felt that the partnerships were acceptable as they were (Tr. 459). Their continuance of this practice over a number of years is a circumstance in appellant's favor. In any attempt by the Government to fasten upon appellant a criminal intent as the inspiring genius in this method of reporting income, appellant was entitled to have appellant's communications to Wallace's office fully brought out by the person having testimonial

knowledge of them. Instead, the bare statement in the record by Wallace that appellant directed a division of income through partnerships conveys an impression at once misleading and inconsistent with the undisputed background facts of the activities of Wallace's office. Its acceptance on this aspect of the case where the issue was sharply drawn because of the troublesome and confused nature of family partnerships (cf. Tr. 459) was in violation of the rule "rejecting assertions offered testimonially, which have not been in some way subjected to the test of cross-examination" (Wigmore on Evidence, 3rd Ed., vol. 5, section 1362).

(b) Wallace or his office also prepared and filed with the Bureau of Internal Revenue the tax returns of some of appellant's children. Over the years, he became generally familiar with appellant's family and knew some of the children, at the same time as he prepared returns for appellant and for the above partnership operations (Tr. 1155-57). In doing this, his office followed the practice of transposing to the individual returns of appellant and children, their respective shares of the partnership income appearing in the partnership returns he, Wallace, had prepared in his office (Tr. 1156, 1230).

On direct examination by the Government in respect to four 1945 individual income tax returns of appellant's children (Exh. 23, Alvin Chan; Exh. 25, Janet Chan Lee; Exh. 29, Norman Chan; and Exh. 22, Bertha Chan), Wallace testified that appellant gave him the information and instructions as to the income to be reported on said children's returns (excepting iso-

lated items of farm and salary income) (Tr. 1109-17). On cross-examination, Wallace admitted he had no personal knowledge of the communication of any such information or instructions, either to himself or others in his presence (Tr. 1290-93).

The refusal of the Court to strike this evidence was erroneous on the same principles heretofore discussed. (See subdivision (a), supra.) This error was prejudicial to appellant, since it augmented the error discussed in subdivision (a) hereof, conveying the impression that appellant first directed the division of the partnership income, and then, to consummate the scheme directed its distribution upon his children's returns.

(c) This accumulated error was itself augmented during the redirect examination of Wallace, when he testified that a deduction for depreciation taken on appellant's sons return (Exh. 23, Alvin Chan) "was evidently directed to Mr. Peffers when he prepared the return", meaning, as it is apparent from the context, directed by appellant (Tr. 1412-1413). It is clear from the testimony at this point that Wallace had no "direct knowledge" and that his foregoing testimony was hearsay.

(d) The substantial impact of all the foregoing on the jury is appreciated when reference is made to the Government's list of appellant's income omissions in Exhibit 334. Wallace's testimony was at the basis of the first seven items in this summary, representing the most substantial part of the alleged omissions, an amount of $70,495.99 out of the claimed total of $108,-631.11.

2. **The Court erred to the prejudice of the appellant in admitting in evidence the conclusions and opinions of the witnesses William A. Wallace and James L. Wiley, as to the character and ownership of Gerdon Land Co. Accounts Payable and in admitting in evidence, during the Government's examination of the witness Liston O. Allen, Exhibits Nos. 92, 93, 94, 95, 247 and 248** (Specifications Nos. 6, 7, 8).

(a) There appeared on the books of the corporation Gerdon Land Co., which Wallace set up and maintained, a ledger account entitled Accounts Payable No. 20 (see Exh. 56a, Accounts Payable No. 20.) These books were not appellant's (Tr. 1296). The above Accounts Payable provided for entries of debits (money going out of the corporation), credits (money coming into the corporation) and a balance. The balance represented a liability of the corporation (Tr. 1295-97). The question was—to whom?

This question became an important one on the issue of appellant's intent in connection with the partnerships, because the net cash available for disbursement after payment of expenses, derived from the largest partnership—the Admay Co.—in effect wound up in Gerdon Land Co., appearing as a credit in Account No. 20, whereas the rent charged by Gerdon Land Co. (which owned the property) to Admay Co. (which leased it) appeared as an offsetting debit usually entered at the end of the year.

The theory of the Government, in its attack on the partnerships, was that: first, the balance of the above ledger account represented a liability to one person, viz. appellant; secondly, appellant ultimately got the partnership moneys.

The Government attempted to prove the first through two witnesses, Revenue Agent Wiley and Wallace.

On direct examination Wiley was asked (Tr. 379-381):

> "Q. Does this have any name at the top of the account other than 'Accounts payable, Account 20'?
>
> A. No, sir.
>
> Q. You say this you identify with the defendant Chin Lim Mow. Through what means do you do that?
>
> Mr. Sullivan. I object to that, if your Honor please, on the ground it calls for secondary evidence; that the best evidence are the books themselves.
>
> The Court. Objection will be overruled.
>
> A. Through Mr. Peffers, the accountant.
>
> Mr. Sullivan. I move to strike—pardon me, your Honor please—I move to strike the answer as based on hearsay.
>
> The Court. Motion denied.
>
> Q. (By Mr. Fleming). Was Mr. Peffers the man who kept the books?
>
> A. Yes, sir.
>
> Q. Did you also examine some of the specific transactions in this Account 20 to identify them?
>
> A. Yes, sir.
>
> Q. And what was the result of that examination?
>
> A. Well, there have been—I don't quite understand what you mean, Mr. Fleming.
>
> Q. Well, let me ask it this way: did you make a detailed examination of the entries contained therein?

A. Yes, sir, I made a transcription of all the detailed entries in this account.

Q. As a result of that work did you identify that account with the defendant, Chin Lim Mow?

Mr. Sullivan. I object to that, if your Honor please, on the ground it calls for an opinion and conclusion of the witness.

The Court: Overruled,—

Mr. Sullivan. I am sorry, your Honor. I submit the books are the best evidence as to whether they identify themselves with the defendant, Chin Lim Mow.

The Court. Overruled.

Mr. Fleming. Will you read the question?

(Question read.)

A. Yes, sir."

On redirect examination Wiley was asked (Tr. 478-479):

"Q. Mr. Wiley, to whom did you attribute that account in your own report?

Mr. Sullivan. I object to the question, if your Honor please, being an opinion and conclusion of the witness; and upon the ground the books are the best evidence; upon the further ground that the report is hearsay, not binding on this defendant.

The Court. Objection will be overruled.

A. Would you restate it? May I have the question read, please?

The Court. Read the question, Mr. Reporter.

(Question read.)

A. Mr. Chan.

Q. (By Mr. Fleming). By Mr. Chan, you are referring to the defendant, Chin Lim Mow?

A. Yes, sir."

On direct examination Wallace was asked (Tr. 1124-1125):

"Q. And that is headed accounts payable, account No. 20?

A. That is right.

Q. Do you find a credit or a debit amount in that account?

A. Credit.

Q. Does that mean, then, that this reflects monies owed by the corporation or owed to the corporation?

A. Owed by the corporation.

Q. What amount do you find in there at the end of 1944?

A. $235,606.75.

Q. The end of 1945, directing your attention to the first figure—

A. $306,568.83.

Q. To your knowledge to whom are those monies owed by the corporation?

Mr. Sullivan. I object to that, if your Honor please, on the ground the books are the best evidence. It calls for the conclusion and opinion of the witness.

The Court. If he knows he may answer.

The Witness. We have referred to this account in the past as Chin's account in our office conversations.

Mr. Sullivan. I move to strike that, if your Honor please, upon the following grounds: one, it is the conclusion and opinion of the witness; second, it is hearsay. There is no statement in the

witness' testimony that the defendant was present when that reference was made; on the third ground—well, I will rest on those.

The Court. The motion is denied.

Q. (By Mr. Fleming). Does it represent, according to your knowledge, a liability to one person or more than one person?

Mr. Sullivan. The same objection, if your Honor please, on the ground the books are the best evidence. It calls for the conclusion and opinion of the witness.

The Court. The objection will be overruled.

The Witness. To one person.

Q. (By Mr. Fleming). Who is that one person according to your knowledge?

Mr. Sullivan. The same objection, if your Honor please.

The Court. Same ruling.

A. Mr. Chin."

On redirect examination Wallace was asked (Tr. 1366-1367):

"Q. Could you then answer the question again, and tell me whether Account 20 represents, according to your knowledge, a liability to one person or to more than one person?

Mr. Sullivan. I object to that, if your Honor please, on the ground the books are the best evidence. It calls for the conclusion and opinion of the witness.

The Court. The objection will be overruled.

A. To answer that—will you ask that question again?

(Question read.)

A. I think my answer is as read from that prior transcript; that answers it correctly. We were dealing with one person, and, so far as I knew, that was the man we were dealing with and apparently—

Mr. Sullivan. I move to strike that answer, if your Honor please.

The Court. The motion is denied.

Q. (By Mr. Fleming). And the Account 20, according to your knowledge, represents a liability to which person?

Mr. Sullivan. Same objection.

The Court. Same ruling. Overruled.

A. Chin Lim Mow."

Assuming their relevancy, the books themselves were the best evidence. They were not appellant's books or in his handwriting. They were not even in the handwriting of Wallace (much less Wiley) who admitted there was not a "scratch" of his "pen" in any of the Gerdon books (Tr. 1447).

The books themselves were the best evidence, and were in Court. Wiley's statements as to with whom he "identified" Account 20 was his naked opinion. Wiley's report to his superiors including any statements pertaining to Account 20 would, if offered by the Government, be rank hearsay; certainly therefore his testimony as to the contents of the report were equally, if not more, objectionable.

Wallace's testimony on this subject also represented naked opinions. He admitted as much on cross-examination (Tr. 1447-51).

In reality, both Wiley and Wallace were expressing their understanding or how they "considered" the account (to use Wallace's words). Such testimony was not admissible. (32 *C.J.S., Evidence,* sec. 451.)

(b) During the direct examination of the witness Liston O. Allen, who, with his brother John J. Allen, Jr., acted as attorney for Gerdon Land Co., as well as for appellant (Tr. 640-1), the Government offered and the Court received in evidence six checks of the Gerdon Land Co., signed by John J. Allen and Donald Allen (another brother and corporate officer) payable to the order of appellant and in amounts and dates as follows: Exhibit No. 92, $75,000 dated July 16, 1946 (Tr. 683); Exhibit No. 93, $46,000, December 6, 1946 (Tr. 686); Exhibit No. 94, $25,000, August 22, 1946 (Tr. 690); Exhibit No. 95, $8,243.50, August 22, 1946 (Tr. 684); Exhibit No. 247, $75,046.76, January 14, 1947 (Tr. 687); and Exhibit No. 248, $44,459.09, April 1, 1947 (Tr. 688).

All of these were admitted in evidence over appellant's objection that they were irrelevant and immaterial, not within or connected up with the issues of the case (cf. Tr. 683). The objection was renewed in more specific terms upon the offer of Exhibits 247 and 248 (Tr. 687-8). In response to the objection entered to Exhibit 247, the Court said (Tr. 687): "* * * I am admitting it in evidence because it tends to show a common pattern". The Court did not indicate, however, nor did the Government offer to state, what the common pattern was.

In connection with the offer of each check, the prosecutor directed the attention of the jury to the entry of said check in the ledger of Gerdon Land Co., as a charge against Account No. 20.

The relevancy of this documentary material never appeared. None of the checks were ever logically connected up with either of the Government's two "methods" or "theories" of case: they did not represent a specific income omission (see Exh. 334); they were not taken in account in any net worth analysis (see Exh. 339). They are patently remote in time and not occuring in the year of the indictment. If the intimated, albeit unexpressed purpose, of their offer (as gleaned from references to Account 20) is to show that appellant "got the money", such a purpose is defeated by the evidence itself on two grounds: (a) nowhere does the Government show that these checks represent proceeds from the partnerships; (b) the account itself (see Exh. 56, Acc. No. 20) shows a credit balance *at the time each check was drawn* sufficiently large to cover the Admay partnership proceeds credited to Account No. 20 (estimated at $100,000) to show that appellant was receiving from Gerdon *his own money for which he was charged on the corporate books* (see testimony Wallace, Tr. pp. 1438-40); (c) *in fact,* appellant did not funnel any partnership money out of this account by these checks because the credit balance in Account 20 actually *increased* approximately $30,000 in 1945, and although it decreased about the same amount (approximately $34,-

000) in 1946, it increased substantially in subsequent years, and at December 31 of every year from 1947 to 1951, the balance was considerably in excess of that used by the Government in its balance sheet (Exh. 339).

(c) The admission of the above oral and documentary evidence was prejudicial because it created the impression that appellant was by indirect means appropriating to himself the proceeds of the Admay partnership. The impact of this on the jury cannot be lost sight of, since the above six checks in themselves of no relevancy, were first associated seriatim with Account 20 and then treated in total, although representing withdrawals over a period of seven months, thus conveying the idea to the jury that appellant was funneling out huge sums of money (Exh. 92, 93, 94, 95, 247 and 248, total $273,749.35). The prosecutor had the witness Allen total on a blackboard (Tr. 689) Exhibits 92, 93, 95, 247 and 248 *along with* a check for $96,830.71 in Exhibit No. 71, to give a total of $345,-880.06. This last exhibit did not affect the balance of Account 20 at all as the Government's main witness, Wallace, admitted on recross examination (Tr. 1434-1437); its addition to the other checks only augmented the prejudicial effect of this evidence.

3. **The Court erred to the prejudice of the appellant in admitting in evidence extracts of a statement made by Government witness William A. Wallace to the Intelligence Unit** (Specification No. 9).

During the course of his direct examination Wallace was interrogated from time to time about a 1946

Partnership Return of Income prepared and filed for appellant and two of appellant's children (Exh. 63). The apparent purpose of such an inquiry was to show that real property which appeared on certain 1945 Partnership Returns, was listed in a new partnership in 1946, that there were no records relative to the dissolution of the 1945 partnerships or relating to the distribution of their capital to the former partners at the end of 1945 (Tr. 1077-8, 1084, 1087, 1091, 1099, 1103). In effect, what happened was that all "family" partnerships were in 1946 consolidated in one. On direct examination, Wallace explained this and stated it arose out of a suggestion of Revenue Agent Wiley, and after a discussion of Wallace with appellant's attorney "and I think Mr. Chin himself" (Tr. 1081). On cross-examination (Tr. 1261) Wallace testified that the matter of the various partnerships was discussed with Wiley on two occasions, that Wiley suggested "that one family partnership be set up and the pro-rata of the income be based on the amount of services the members of the family gave to the partnership", that he, Wallace, advised appellant to follow this recommendation and that the idea of the 1946 partnership did not originate with appellant (Tr. 1261).

On redirect examination, and over repeated objections of appellant, the Court permitted the Government to interrogate Wallace in respect to extracts from a written statement given by Wallace to the Intelligence Unit on October 18, 1949 (Tr. 1414-18). We have set forth in the Appendix at page vi et seq. the

entire matters surrounding the admission of this testimony, including the objection of appellant.

In summary Wallace admitted to having made statements to the Intelligence Unit in 1949 which were contradictory to his testimony in Court and in which he stated in connection with the Admay Co. that he had no discussion as to why a partnership return was not filed in 1946 for that company, and was not consulted about any income tax problems that may have been presented by the plan of dissolution of Admay. Nowhere in the pertinent testimony do we find any attempt on the part of the Government to justify this line of inquiry. (Please see Appendix pages vi-x.) No surprise was claimed by the prosecutor, and it is reasonable to infer from the fact that Wallace had testified at an earlier trial of the same indictment (Tr. 1424, et seq.) that none could be claimed. No hostility of the witness was charged nor could it be properly charged in the light of all the testimony of this witness. Under the circumstances, the Government's inquiry was governed by the rule against impeachment of one's own witness and did not come within any of the recognized exceptions. *Hickory v. United States* (1893), 151 U. S. 303, 309, 14 S.Ct. 334, 38 L.Ed. 170; *United States v. Graham* (1939), 2 Cir., 102 F. 2d 436, 441; *Ellis v. United States* (1943), 8 Cir., 138 F. 2d 612, 615. See generally, *Cyc. Fed. Proc.* (3d Ed.) vol. 8, sec. 26.137 et seq.

It was prejudicial to appellant to sanction this impeachment of Wallace. The foregoing testimony on direct and cross-examination brought into sharp focus

Wallace's activities as a tax consultant. It showed that Wallace was in fact advising appellant on the troublesome and confusing subject of family partnerships for tax purposes (cf. testimony Wiley, Tr. 459) and at the same time counteracted any impressions from other testimony of the same witness, that appellant devised such partnerships as schemes of tax evasion. On the other hand, such testimony, free of impeachment, could have very well conveyed the impression to the jury that the many partnership returns prepared by Wallace over the preceding years had their origin in the advice of a tax consultant rather than in any personal scheming of appellant.

4. **The Court erred to the prejudice of the appellant in admitting in evidence during the Government's examination of the witnesses Evelyn Lee Chang, L. F. Clarke, Dana E. Bremner, Leon C. Banker, and Norman Ogilvie, certain oral and documentary evidence of transactions pertaining to the Pacific National Bank trustee account of Howard and Evelyn Lee Chang and the purchase of "The Quarry"** (Specifications Nos. 10, 11 and 12).

In our statement of the case, supra, under the subtitle "The Net Worth Case—Chang Trustee Account", we have set forth the salient features of this evidence. The net result of the evidence was to add to appellant's closing net worth at December 31, 1945 (see Exhibit 339 reproduced in Appendix), and thus to appellant's reconstructed income on a net worth basis, the amount of $100,000. This $100,000 is distributed among the asset items of appellant's balance sheet in the following manner: (a) $12,500 represented by a cashier's check issued by said bank (Exh. 233) dated November 13, 1945, payable to the order

of Pacific States Savings & Loan Society, procured by Evelyn Lee Chang with funds from said bank account (Exh. 240) and charged to the account (Exh. 239, page 2; Exh. 338, item 5); (b) $17,500 represented by the balance in said account at December 31, 1945 (Exh. 239, page 3; Exh. 278, item 12); (c) $70,000 represented by currency in that amount delivered by appellant to Mrs. Chang and by her deposited in the account on January 3, 1946 (Exh. 239, page 3; Exh. 278, item 15).

It will be seen, therefore, that each of the three asset items charged to appellant is referable to the trustee account, and that in effect, the net worth analysis treats the account as if it were appellant's. *But there is no testimony at all in the record that the bank account was appellant's.* Mrs. Chang testified on direct examination (Tr. 1495) that she signed the signature card (Exh. 230) at her husband's request; and that "this account as I understand it, was opened as a trusteeship for Mr. C. C. Wong and in my husband's absence and in Mr. Wong's absence I was to take my instructions from Mr. Chan" (meaning appellant) (Tr. 1496). The witness admitted she knew C. C. Wong, who was an old friend of her husband (Tr. 1511). L. F. Clarke of the Pacific National Bank, who produced the records of this account, did not in any way identify appellant with it. Nevertheless, on direct examination of this witness, at the very start of her testimony on this subject and over appellant's objection, both the signature card (Exh. 230) and the ledger cards (Exh. 239) of the account were admitted in evidence (Tr. 1494, 1496).

We, therefore, next take up separately the three items of the account above referred to, to the end of demonstrating the monies represented by them were not shown to be appellant's:

(a) ($12,500) The cashier's check representing this sum was obtained at appellant's direction but *in reality* upon directions given Mrs. Chang by her husband, Howard Chang, to take instructions from appellant in his and Wong's absence (Tr. 1496-7). Her husband had previously left for China (Tr. 1495). An attempt was made by the Government to charge this $12,500 to appellant through the testimony of Mr. Clarke, that the original deposit of $30,000 in the account was in a miscellany of currency (Tr. 1458) and that although he could not state who brought in the $30,000 and who brought in the subsequent deposit of $70,000, one of the deposits was brought in by Mrs. Chang and the other by "a Chinese gentleman". Mrs. Chang stated she did not know if she made the $30,000 deposit (Tr. 1495), but admitted on cross-examination that she made the $70,000 deposit (Tr. 1510). It is a reasonable inference from the testimony that Howard Chang was in the United States on October 9, 1945, the date of the signature card which he signed and the date of the $30,000 initial deposit. On the other hand, no reasonable inference can be drawn from the fact that the check which appellant instructed Mrs. Chang to draw on November 13, 1945, came from the original currency deposit, because on November 1, 1945, that $30,000 had been exhausted and *an overdraft of $2500* existed in the account (Exh. 239, page

2). *The only source of funds available for the check of $12,500 on November 13, 1945, was the deposit of $23,820 on November 3, 1945. The Government made no attempt even to trace the last mentioned deposit to appellant.*

(b) ($17,500) This year-end balance can only be traced to two deposits in the account—the November 3, 1945 deposit of $23,832 above mentioned, and the November 19, 1945 deposit of $8,668. *The Government introduced no evidence whatsoever concerning these deposits or their source.*

(c) ($70,000) Mrs. Chang testified on direct examination that the appellant gave her this amount in currency, which was deposited in the bank account of January 3, 1946, appellant's chauffeur having driven her to the bank for that purpose (Tr. 1498). There was no testimony, however, as to who owned the $70,000. At appellant's instructions she drew and delivered to appellant a certified check dated January 4, 1945, for $84,000, payable to the Oakland Title Insurance & Guaranty Co. (Exh. 235), which title company was handling the escrow transaction for the purchase of the property located at 5000 Broadway, Oakland, and known as "The Quarry" (testimony of Dana E. Bremner, Tr. 238, et seq.). Based on the above evidence, the Government charged the entire $70,000 to appellant. *But the subsequent developments appearing from the Government's own evidence dispels any reasonable inference that the $70,000 was appellant's money, and, on the contrary,* identifies the $70,000 with Howard Chang, not appellant. On Feb-

ruary 14, 1946, the said title company returned $26,-500 to Howard Chang (see Exh. 163), which was deposited in the above account on February 16, 1946 (Exh. 239, page 5). (See testimony Bremner, Tr. 242.) On March 25, 1946, Mrs. Chang drew a check on the account for $28,000 payable to the order of Bock Hing Trading Corporation. On direct examination she said she did this either at her husband's or appellant's direction (Tr. 1500); on cross-examination she admitted to having testified at the first trial that it was upon her husband' direction (Tr. 1507-8). On Government's Exhibit 223, page 2, being a financial statement of Bock Hing Trading Corporation at April 3, 1946, is found under liabilities "Loans from others * * * C. C. Wong * * * $28,000". She further testified (Tr. 1500) that she drew a check dated December 9, 1946, at her husband's direction, payable to her husband's company, United Trading Corp., and deposited to its account, which account significantly Howard Chang maintained at the Pacific National Bank (see Exh. 243).

It thus appears that: first, the bank account in question was not appellant's; secondly, $30,000 of the $100,000 (paragraphs (a) and (b) above) were not traceable to appellant at all; thirdly, although appellant had possession of the $70,000 (paragraph (c) above), there is no evidence at all as to the ownership of this money, and $26,500 of it was subsequently returned to Howard Chang, not appellant; fourthly, the funds from the bank account were being used in furtherance of negotiations by or on behalf of C. C.

Wong for the purchase of the property located at 5000 Broadway and known as "The Quarry". This last appears from the Government's own evidence (Exh. 245 and 246), the latter of which, in an attached agreement between Gerdon Land Co. and C. C. Wong, dated February 1, 1946 (notably subsequent to the incidents referred to in (a), (b) and (c) above), shows the original negotiations by C. C. Wong for the purchase of the property and the subsequent completion thereof by Gerdon Land Co.

On any reasonable application of the principle of "logical relevancy", the above evidence (including exhibits) together with the preliminary testimony of Mr. Clarke on the bank records (Tr. 1457 et seq.), Mr. Bremner on the title company records (Tr. 238 et seq.) and the witnesses Banker (Tr. 704 et seq.) and Ogilvie (Tr. 720 et seq.) on the real estate negotiations, had not been connected up with appellant or any of the issues and should have been stricken. It had no part in the case.

Its retention in evidence was prejudicial to appellant. Not only did such evidence permit Government's witness Brady to take into account in his net worth calculations an extremely large sum of money ($100,000), but the jury would obviously be impressed by the evidence, since, considered as an integrated transaction, *it involved the largest single item of net worth increase in the entire calculation.*

5. **The Court erred to the prejudice of the appellant in admitting in evidence testimony of the witness George Gibbons pertaining to trips made at appellant's direction** (Specification No. 13).

George Gibbons, called as a witness by the Government, identified himself as a "bodyguard, chauffeur, Jack-of-all-trades" for appellant over a period in excess of twenty years (Tr. 195). On direct examination (Tr. 196) he stated his duties were to make change for the Wai Yuen Club, appellant's gambling enterprise. On cross-examination (Tr. 210-11) he acknowledged that these gambling activities were conducted at different locations from time to time. He further stated on direct examination that at appellant's direction he made trips to the Hollywood Club in Watsonville in 1945—"if it was open, I did" (Tr. 199); to Bakersfield at an unidentified time and year (Tr. 199); to Alviso, during an unidentified year (Tr. 200); to 103 Yosemite Avenue in the year 1945 "if it was open, yes, sir. If it wasn't I don't think so" (Tr. 201); to 3600 San Pablo, Emeryville, to see a place that was being remodelled (Tr. 202); but he never visited the Hollywood Club at 204 San Pablo, Emeryville or the Hollywood Club in Yosemite (Tr. 206-7). On cross-examination, this witness could not state and would not place the year 1945 as the time when he visited Watsonville (Tr. 213), Alviso (Tr. 214), or Bakersfield (Tr. 215). He observed no gambling either in Alviso or Bakersfield (Tr. 215).

It is apparent that the Government's purpose was to show appellant conducted gambling on a wide scale in 1945. This in accordance with the prosecutor's

opening statements (Tr. 97) that "in the year 1945 which is the year we are concerned with, the defendant operated some eleven gambling establishments" and that "the gambling places were located at various spots in San Mateo County, San Francisco, Contra Costa, Bakersfield, Santa Cruz and other places".

In his net worth summary, Government witness Brady included as seven separate items each of the above locations and in each instance gave the record reference of Gibbons' testimony as justification for so doing (see Exh. 339). Immediately below them Brady inserted the following item: "Bank Roll—Cash for above Clubs".

It is clear from the record that Gibbons did not visit Watsonville, Bakersfield, Alviso, or the Hollywood Club in Emeryville at all in 1945. There is absolutely no evidence in the record that any gambling activity or club was conducted by appellant during 1945 at the above four places or at 3600 San Pablo. Gibbons never visited Hollywood Club at 204 San Pablo at all, yet that is also included in Exhibit 339, *significantly with the page reference to Gibbons' testimony omitted.*

All in all, it was beyond doubt that the prosecutor had failed in his promises of proof (Tr. 97 and supra). The Wai Yuen Club's gambling activity at The Palms was never an issue (cf. testimony Overstreet, Tr. 175-6), and the raid at Yosemite Ave. was never shown to be in connection with a second or separate club. David Shew, the Government's witness and the accountant who kept the books of the

Wai Yuen Club, testified it was one and the same club at different locations (Tr. 880-1).

At the basis of all this, therefore, was the testimony of Gibbons, which should have been stricken (motion made and denied, Tr. 1944-5) when at the end of the Government's case in chief its irrelevancy appeared beyond any question. The prejudicial effect of this ruling is incalculable. The jury were clearly left with the impression of a far-flung gambling empire, with a courier transporting mysterious packages ("I would generally get a package of money—I don't know what it was. It was supposed to be money"—Gibbons, Tr. 199) of profits on a magnificent scale. More unfavorable, was the implication from this evidence that appellant had concealed the income from these several establishments, an aspect given further emphasis by the Court's charge to the jury dealing with their consideration of the evidence pertaining to the "practice of gambling" (Tr. 2087; see Argument I, No. 4, supra).

6. The Court erred in permitting Government witness Brady to assume facts contrary to the evidence (Specification No. 14).

Augustus V. Brady, a witness for the Government, was a technical adviser assigned to the Penal Division of the Bureau of Internal Revenue (Tr. 1783). He was by profession an accountant. On direct examination, he identified a number of so-called charts (Exh. 280-82 incl., 337-342 incl., 344, 345 and 347) which he had prepared at the "direction" and "request" of the prosecutor. He stated that the data which he had summarized on the charts was data

that he had secured from evidence given at appellant's trial.

Of the above exhibits, No. 337 was offered first, to which appellant objected at length (Tr. 1801-2), including, among other grounds, that the exhibit was "based upon assumptions of facts or inferences from facts which are not in evidence" and that the document was "incompetent, irrelevant, immaterial, prejudicial and basis for improper examination of the entries." The Court permitted appellant's counsel to make the same objection by reference, upon the offer of all of the remaining exhibits above mentioned and to the testimony of Mr. Brady in explanation of his charts. All objections to all exhibits and explanatory testimony were overruled.

On cross-examination Mr. Brady admitted that the basis of the inclusion of each entry of every chart and supporting schedule he prepared was a direction to him by counsel for the Government to put the entry on the paper (Tr. 1872).

Uncontradicted evidence assembled under Specifications Nos. 10, 11 and 12 (Argument II, No. 4, supra) demonstrated that appellant was not connected up with the Howard and Evelyn Lee Chang trustee account, yet Mr. Brady charged appellant with $100,000 in appellant's closing net worth (Tr. 1908).

Uncontradicted evidence assembled under Specification No. 13 (Argument II, No. 5, supra) demonstrated that Brady used Gibbons' testimony as the basis for his gambling club items on Exhibit Number 339 and in part for his item on "Bank Roll—Cash for above Clubs." On cross-examination (Tr. 1896

et seq.), he stated he was instructed to put $50,000 in the balance sheet, at both beginning and end of the year 1945, and that the set of entries on Exhibit Number 339 *meant there were a number of clubs in operation some time during 1945,* but they had a bank roll of $50,000 (Tr. 1896). He could find no justification for this in the evidence, and in the course of his cross-examination testified: "I believe it is up to the jury, *I put down what I was instructed to.* This I think represents the Government's viewpoint of the case" (emphasis ours; Tr. 1898). The Overstreet testimony to which Brady referred on his chart (Exh. 339) pertained to the Wai Yuen cash in the sum of $47,259.40 seized by the authorities in a raid on the Wai Yuen Club on February 4, 1945 (Tr. 173). Some basis of relevancy would sanction the use of this amount at the beginning of 1945 (there being no great remoteness) but not at the end of 1945, since the club had been closed for the last three months of the year (Tr. 914). The net results of this was to arbitrarily add approximately $50,000 to appellant's income on a net worth basis.

Evidence, introduced by the Government in Exhibit Number 186, a balance sheet for the Wai Yuen Club at December 31, 1945, prepared by David Shew, showed an increase in liabilities of the club of $16,000 during 1945 together with a liability for withholding tax in the sum of $5,219.80, making a total increase of liabilities in the sum of $21,219.80. In his calculations, Mr. Brady ignored this sum entirely, the net effect of which was to add another $21,219.80 to appellant's income on a net worth basis.

The effect of admitting Mr. Brady's documents and explanatory testimony, in the light of the above three instances of his assumptions contrary to the evidence ("I put down what I was instructed to", supra), was prejudicial to appellant. *The above three items represented a total of $171,219.80 in net worth increase, and thus net income of appellant on this reconstructed basis. This was the very heart and substance of the net worth case.*

The inclusion by Mr. Brady of the foregoing data on these three items in his balance sheets (as well as the erroneous admission of the Chang Trustee account evidence—see Argument II, No. 4, supra) was prejudicial to appellant. Other serious conflicts between the Government and appellant existed: for example, on "Account 20 Gerdon Land Co.", the Government's increase was $70,962.08 (see Exh. 339, item 2), whereas defense increase was only $29,655.39 (Exh. DD, item 3), a difference of $41,306.69 (it will be recalled that the Government's evidence here was based on Wiley's and Wallace's naked opinions of the character of Account 20—evidence erroneously admitted—see Argument II, No. 2, supra); as well as other smaller items such as the Wai Lee Co. and the Bock Hing Trading Co. The $171,219.80 included by Mr. Brady represented not only the most substantial part of the increase, but arose out of transactions (large real estate investment and gambling) which would be more likely to impress the jury. If this had not been included, it is very likely that the jury would feel that the net worth analysis was not unfavorable to appellant, and, in turn, *not having confirmed the*

Government's first method of proof, would have cast great doubt on the results therein reached. The Bureau of Internal Revenue frequently employs the net worth-expenditures method in an attempt to substantiate the results of other methods of audit. (See testimony Brady, Tr. 1869-70). If the Government here had failed to substantiate its other method, such failure would undoubtedly have had a great bearing on the issues to be determined by the jury.

Finally, any such net worth method falls and is worthless to prove anything, unless all of the assets of the taxpayer are accounted for at the time of the opening net worth (here December 31, 1944). *United States v. Fenwick,* supra, at p. 492; *United States v. Chapman,* supra, at p. 1001; *Bryan v. United States,* supra; *Brodella v. United States,* supra, at p. 824. Yet here Brady admitted that he had not taken into account in his net worth analysis several items identified in appellant's tax returns which might have had a direct bearing on appellant's opening net worth. This again, we respectfully suggest, points up the necessity of having the jury adequately charged on the net worth method and the prejudicial error committed by the Court in refusing to give appellant instructions on that subject (See Argument I, No. 2, supra).

These errors in the admission of evidence, considered individually and collectively, may well have been decisive of the case. Certainly they cannot be disregarded "as without probable substantial influence

upon the verdict of the jury." *Wolcher v. United States* (1952), 9 Cir., 200 F. 2d 493, 499. See also, *Kotteakos v. United States,* 328 U.S. 750, 764, 66 S. Ct. 1239, 1248, 90 L. Ed. 1557, 1566-1567. As this Court said in the *Wolcher* case, supra, at page 500, "The errors here listed require a reversal since in our judgment 'the error might have operated to the substantial injury of the defendant.' *United States v. Grady,* 7 Cir., 185 F. 2d 273, 275."

III. DENIAL OF MOTION FOR NEW TRIAL.

1. **The Court's denial of the appellant's motion for a new trial was a manifest abuse of discretion** (Specification No. 21).

It is our contention, finally, that in light of the various rulings of the trial Court, as discussed hereinabove, in connection with the instructions to the jury and the admission of evidence, the refusal of the Court to grant a new trial constituted a clear abuse of discretion. *Cavness v. United States* (1951), 9 Cir., 187 F. 2d 719, 722, cert. den. 341 U.S. 951, 71 S. Ct. 1019, 95 L. Ed. 1374; *United States v. Hayes* (1949), 9 Cir., 172 F. 2d 677, 678; Rule 33, Federal Rules of Criminal Procedure.

CONCLUSION.

We have shown that the trial Court committed numerous errors in giving instructions to the jury and in refusing to give other instructions. Some of the erroneous instructions thus given pertained to such vital matters as criminal intent and the priv-

ilege against self-incrimination. It would be hard to conceive of errors which could more seriously affect the substantial rights of the accused in a criminal case. The instructions refused by the Court embodied the settled principles of law applicable to the net worth-expenditures method of proof, and without such instructions in a complicated case of circumstantial evidence, the jury could not fairly consider the evaluate the evidence on this issue. Furthermore, the instructions as a whole were unbalanced and prejudicial.

In addition, we have shown that the Court made numerous harmful errors in admitting evidence, both oral and documentary, which in some instances served to accentuate the erroneous rulings in connection with the instructions to the jury.

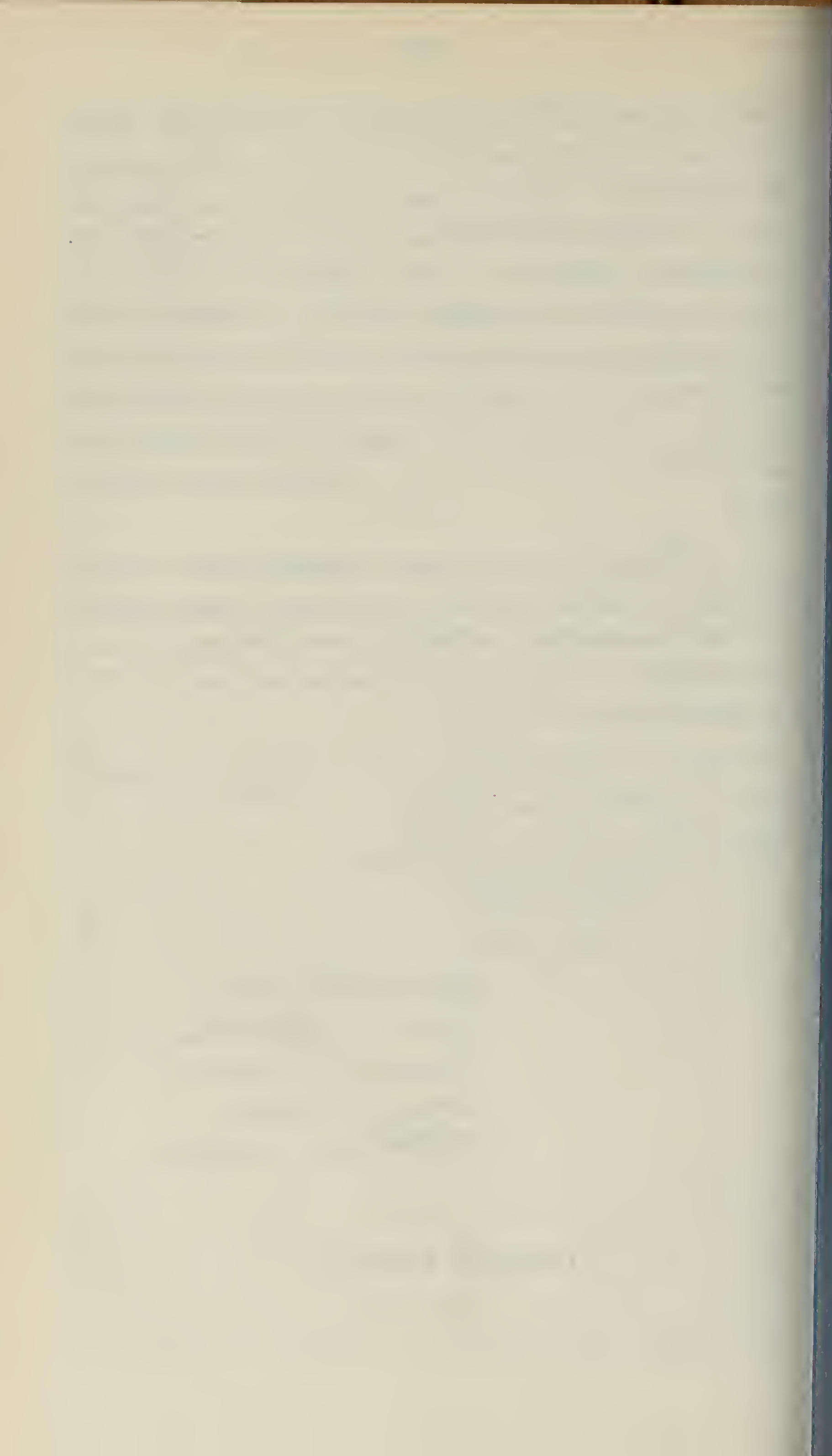
In justice to this appellant, we urge that the judgment of conviction be reversed.

Dated, San Francisco, California,
June 15, 1953.

Respectfully submitted,

William M. Malone,
Raymond L. Sullivan,
William B. Wetherall,
Conrad T. Hubner,
Attorneys for Appellant.

(Appendix Follows.)



Appendix.

Appendix

GOVERNMENT'S NET WORTH STATEMENT AS AT DECEMBER 31, 1944 AND DECEMBER 31, 1945.

(Government's Exhibit 339.)

HN LIM MOW

San Francisco, Calif.

NET WORTH STATEMENT AS AT DECEMBER 31,

ASSETS		1944	1945
as in Banks & On Hand –	Separate Schedule	127,947.31	144,030.91
ccunt 20 Gerdon Land Co.	Exh. 56	248,143.43	319,105.51
lisellaneous Deposits –	Separate Schedule	26,000.00	22,000.00
. S Government Bonds –	Exh. 274	56.25	6,056.25
lans against Wilbur Pierce –	Farley – Exh. 257	17,509.47	20,935.07
merican Distilling Co. Stock –	Wiley – Exh. 10	61,000.00	61,000.00
/a Yuen Club –	Separate Schedule	22,081.55	37,658.19
i Son Co. –	Exh. 58	1,000.00	1,000.00
Vestern Supply Co. –	Wiley – Exh. 302	500.00	500.00
nited Trading Corpn. –	Evelyn Lee Chang – Exh. 242	10,000.00	10,000.00
nited Food Supply Co. –	Evelyn Lee Chang – Exh. 242	23,937.71	23,937.71
'a Lee Co. –	Separate Schedule	5,641.56	12,834.11
andarin Hotel –	Exh. 258	5,477.00	1,090.47
ienhan Hotel –	Exh. 259	2,251.41	2,177.56
ple Hotel –	Exh. 260	4,306.78	5,953.19
aymore Auto Court –	Exh. 261	982.20	3,069.39
in ran Hotel –	Exh. 262	—	3,054.21
it Company –	Exh. 270	53,630.00	43,800.00
ere Building –	Exh. 316 & Wallace	45,622.41	45,283.43
'a Estate Holdings –	Separate Schedule – Exh. 264	278,475.43	565,228.94
estern Dept. Store Stock –	Exh. 1 – 1945 Return	3,420.97	—
c Hing Trading Corpn. –	Exh. 223 – Exh. 224	—	3,848.45
atonville –	Gibbons p. 116	X	X
kersfield –	Gibbons p. 119	X	X

Alviso –	Gibbons p. 118	X	
Yosemite Club –	Gibbons p. 120	X	
Hollywood Club –	Gibbons	X	
3600 San Pablo, Emeryville –	Gibbons p. 120	X	
The Palms	Gibbons p. 115	X	
Bank Roll – Cash for above Clubs –	Overstreet –	50,000.00	50,0[illegible]
Lions Den –	1947 Return – Exh. 283	25,000.00	25,0[illegible]
Cash Surrender Value of Life Insurance –	Stipulated – Exh. 312	26,771.54	31,6[illegible]
1/8 Interest Mandarin T Theatre –	Hogan p. 582	10,500.00	10,5[illegible]
	Total Assets	1,050,255.02	1,449,7[illegible]

LIABILITIES

Real Estate Loans on Separate Schedule –	Stipulated – Exh. 311	112,449.76	265,[illegible]
Loans on Life Insurance –	Stipulated – Exh. 312	18,703.40	20,[illegible]
Reserve for Depreciation –	Exh. 265	32,628.49	44,[illegible]
Hogan & Vest Loan –	Hogan p. 587	—	5,[illegible]
	Total Liabilities	163,781.65	334,[illegible]
Net Worth –		886,473.37	1,115,[illegible]

APPELLANT'S STATEMENT OF NET WORTH AS AT DECEMBER 31, 1944 AND DECEMBER 31, 1945.

(Defendant's Exhibit DD.)

Schedule 1

Chin Lim Mow

Statement of Net Worth

December 31, 1944 and December 31, 1945

Assets	1944	1945	Reference
k accounts	$107,352.09	$ 54,162.98	Schedule 2 – A
-sonal cash on hand	58,396.85	None	" – B
do Land Co. account	208,623.42	238,278.81	Exh. BS
cellaneous accounts and ains receivable	129,447.18	118,872.78	Schedule 2 – C
osits	25,500.00	4,500.00	" – D
h surrender value – e insurance	26,771.54	31,664.43	Exh. 312
ries	3,477.22	6,056.25	Schedule 2 – E
estate	301,969.35	576,404.09	" – F
s en	25,000.00	25,000.00	Exh. 283
a Co. – partnership interest	13,911.69	18,261.86	Schedule 2 – G
Y en Club	37,140.95	(15,561.61)	" – H
L Co.	1,333.40	3,208.53	Exh. 282
C.	20,100.00	15,000.00	Exh. 270
m o. – partnership interest	1,000.00	1,000.00	Wiley
te Supply Co. – rtnership interest	500.00	500.00	Wiley
	$960,523.69	$1,077,348.12	

Liabilities & Net Worth	1944	1945	Reference
es te loans	$112,449.76	$ 265,066.71	Exh. 311
s life insurance	18,703.40	20,021.68	Stipulation – Exh. 3
n Vest Loan	None	5,000.00	Hogan p. 587
Total liabilities	$131,153.16	$ 290,088.39	
WORTH	829,370.53	787,259.73	
	$960,523.69	$1,077,348.12	

ecrease in net worth between 1944 and 1945	($42,110.80)	
DD: Non-deductible expenses	58,782.73	Exh. 342
	$16,671.93	
ess: Non-taxable income	16,550.51	Exh. 342
xable net income on net worth basis – year 1945	$ 121.42	
et income reported by Chin Lin Mow and wife	54,341.66	Exh. 1 & 2
Over-reported income for the year 1945 on the basis of net worth	$54,220.24	

NOTE: For lack of evidence, the foregoing assets show no value for the defendant's interest in American Four Co. and Hing Wah Tai Co.

SPECIFICATION OF ERROR NO. 10.

Amplification thereof by a summary of the bank ledger cards of the Pacific National Bank of San Francisco pertaining to an account for "Howard Chang, Trustee, or Evelyn Lee Chang, Trustee, 416 Jackson Street, San Francisco 11, Calif.", which said cards are Exhibit 239 in evidence.

So that the contents of Exhibit 239 will be easily available to the reader, and because it is felt that the reproduction of the 15 ledger sheets, most of which have only one entry thereon, would encumber the appendix, we have summarized the entries as follows:

Checks	Date	Deposit	Balance
	Oct 9 '45	$30,000.00	
$15,000.00	Oct 10 '45		
12,500.00	Oct 11 '45		
	Oct 31 '45		$ 2,500.00
5,000.00	Nov 1 '45		
	Nov 3 '45	23,832.00	
12,500.00	Nov 13 '45		
	Nov 19 '45	8,668.00	
	Nov 30 '45		17,500.00
	Dec 31 '45		17,500.00
	Jan 3 '46	70,000.00	
84,000.00	Jan 4 '46		
	Jan 31 '46		3,500.00
	Feb 16 '46	26,500.00	
	Feb 28 '46		30,000.00
28,000.00	Mar 25 '46		
	Mar 30 '46		2,000.00
	Apr 30 '46		2,000.00
	May 31 '46		2,000.00
	Jun 29 '46		2,000.00
	Jul 31 '46		2,000.00
	Aug 31 '46		2,000.00
	Sep 30 '46		2,000.00
	Oct 31 '46		2,000.00
	Nov 30 '46		2,000.00
2,000.00	Dec 10 '46		
	Dec 10 '46		.00

SPECIFICATION OF ERROR NO. 9.

Amplification thereof by portions of the record of the redirect examination by the Government of the witness William A. Wallace, appearing in the Transcript, vol. IV, pp. 1414-1418.

"Q. Now, I will direct your attention to your testimony of Monday, September 29th, and these questions and these answers:

Mr. Sullivan. May I have the page?

Mr. Fleming. 1345.

'Mr. Wallace, tell us just about the conferences that you personally attended with Mr. Wiley and Mr. Peffers. Please confine your remarks to that, and based upon that will you kindly tell me how many there were, to the best of your recollection?

A. There were two that I recall in which the matter of the various partnerships were discussed, and the final discussion was had with Mr. Wiley, and at that time he suggested that one family partnership be set up and the pro rata of the income be based on the amount of the services the members of the family gave to the partnership, and that matter was discussed, I believe, with the attorneys for Mr. Chin and Mr. Chin the outcome being that this new partnership in 1946 was started.

Q. Isn't it a fact that you advised Mr. Chin to follow the recommendation of Mr. Wiley in this instance?

A. Yes, I believe it was. I believe Mr. Allen, the attorney, was part of the—was there at the time the meeting was held, too, or along about that period.

Q. At any rate, this idea of the 1946 partnership did not originate with Mr. Chin, did it?

A. No, it did not.'

Do you recall that testimony?

A. Yes.

Q. Now, is it your testimony that you discussed the matter of 1946 partnerships with Mr. Chin Lim Mow and with Mr. Wiley?

A. I believe we did.

Q. Well, did you?

A. Yes.

Q. Do you recall making a statement on October 18, 1949, at which were present Frank Filice, Merwyn Freeberg, William A. Wallace, Samuel C. Peffers, and Helen B. Shirley? Do you recall that?

Mr. Sullivan. I object to the question as an attempt by the government to impeach their own witness.

The Court. Objection overruled.

Mr. Sullivan. I object upon the further ground there is no foundation for the impeachment question.

The Court. Lay the foundation.

Mr. Fleming. This question is directed to further development of the testimony I have just read.

The Court. Ask for the time, place and persons present. I believe you have asked that, though, haven't you? Mr. Filice and Mr. Freeberg were present. Ask the date.

Q. (By Mr. Fleming). Do you recall the date of that statement?

A. I don't recall what the item was. What is the item you refer to, Mr. Fleming?

Mr. Fleming. I will ask that this document be marked Government's Exhibit No. 57 for identification.

The Court. It will be received and marked.

The Clerk. It has already been marked.

Q. (By Mr. Fleming). I will show you exhibit 57, for identification, and ask you if you can identify that as your signature attached to the statement?

A. Yes.

Q. Now, I will direct your attention to page 16 of the document, and direct your attention to the questions and answers on that page. Have you read those, Mr. Wallace?

A. This——

Q. Just let me know when you have read that page.

A. Yes, I have read it.

Q. Will you refer to the previous page and tell me whether or not page 16 relates to Admay?

A. Apparently it does.

Q. Will you satisfy yourself that it actually does?

A. Yes, I have read it.

Q. Now, on October 18th, 1949, were you under oath and asked this question and did you give this answer:

'Mr. Wallace, did you file a return for this alleged partnership for the year 1946?

A. No.

Q. Will you please explain why, according to your best recollection, a return was not filed for the year 1946?

A. No discussion was had with me as to why it was not filed. As I understand it, the matter was discussed with Mr. Peffers.'

Were you asked that question and did you make that answer on that date?

Mr. Sullivan. I object to this, if your Honor please, upon the ground that it is an attempt by

the government to impeach its own witness; and that, furthermore, there is no proper or substantial foundation for the asking of the question.

The Court. Objection will be overruled.

Q. (By Mr. Fleming). Were you asked that question and did you make that answer?

A. In this document here?

Q. Those questions I just read.

A. Would you read it again, please?

Q. (By Mr. Fleming). 'Mr. Wallace, did you file a return for this alleged partnership for the year 1946?

A. No.

Q. Will you please explain why, according to your best recollection, a return was not filed for the year 1946?

A. No discussion was had with me as to why it was not filed. As I understand it, the matter was discussed with Mr. Peffers.'

Were you asked that question and did you give those answers?

A. Yes, I did. I had forgotten about the conversation until I checked our files that we did have a discussion with Mr. Wiley at that time about this partnership, this former partnership, and the other was a development, but I didn't quite understand the question at this particular time.

Q. Then the answer you gave in 1949 was incorrect? And the answer you give in 1952 was correct?

A. Yes.

Q. Now, directing your attention to the bottom of the page, Mr. Wallace, the bottom of the page still relates to Admay, does it not, page 16?

A. Which one?

Q. Page 16.

A. Yes.

Q. The last two questions they still relate to Admay? On the same occasion were you asked these questions and did you make these answers: 'Were you asked to do any accounting work in connection with the dissolution of this alleged partnership?

A. No.

Q. Were you consulted about any income tax problems that may or may not have been presented by the plan of dissolution?

A. No.'

Were you asked those questions and did you give those answers?

Mr. Sullivan. I object to that upon the same ground, your Honor, namely, that it is an attempt by the government to impeach their own witness, and that no proper foundation or adequate foundation has been laid for the question.

The Court. Objection will be overruled.

A. I believe those are my answers, yes."

REQUESTED INSTRUCTIONS OF DEFENDANT (Tr. 64-72).

Instruction No. 45.

(Net Worth Method of Proof.)

The Government has attempted to prove its case by what is known as the "net worth and expenditures" method. By this method the Government has sought to prove the amount of the defendant's income during the taxable year 1945 by showing the increase in his net worth during such year and adding to such increase the amount of federal income taxes and pen-

alties, life insurance premiums, and fines paid by him during the year. According to the Government's theory, the total of the net worth increase plus the amount of these particular expenditures during the year represents the amount of taxable income.

In order to establish the increase in net worth during 1945, which is the only year covered by the indictment, the Government has sought to prove the defendant's net worth on December 31, 1941, and using that as a basis or starting point, has sought to prove the defendant's net worth on December 31, 1944, and on December 31, 1945. Thus, by this chain of circumstances, the Government has sought to prove the defendant's net worth at the beginning of the year 1945 and at the close of that year. Proof of this kind, however, is not direct evidence of the defendant's income during the year in question; it is indirect or circumstantial evidence. In order to establish the increase in net worth during the year 1945, the Government must prove the defendant's net worth on December 31, 1941, as well as on December 31, 1944, and on December 31, 1945. And the net worth on each and all of these dates must be established to a moral certainty and beyond a reasonable doubt. If you are not satisfied to a moral certainty and beyond a reasonable doubt as to the amount of the defendant's net worth on December 31, 1941, you must find the defendant not guilty. Likewise, if you are not satisfied to a moral certainty and beyond a reasonable doubt as to the amount of the defendant's net worth at the close of the year 1944 and at the close of the year 1945, you must find the defendant not guilty.

Instruction No. 46.

(Net Worth Method of Proof.)

Where the Government attempts to prove the amount of the defendant's income by the net worth and expenditures method, it must have a starting point, which may be the beginning of the taxable year in question or some prior date. The starting point is a date upon which the Government must establish the basic net worth of the defendant in order to show an increase thereafter. If the starting point is a date prior to the taxable year in question—as in the case before you—the net worth on that date must be adjusted in order to show the net worth at the beginning of the taxable year in question. The burden of proving the starting point net worth, all adjustments, and the net worth at the beginning of the taxable year, rests upon the Government; and all such facts must be established to a moral certainty and beyond a reasonable doubt.

In every case of this kind the starting point must rest upon a solid foundation. The Government's evidence must be so complete and accurate as to leave no reasonable doubt in your minds as to whether all of the defendant's assets have been accounted for. The defendant does not have the burden of proving that some of his assets were omitted from the Government's computation. Essential proof that he had no other assets at the starting point is the cornerstone of the Government's evidence. If that cornerstone is faulty, the whole case for the Government falls. If in

the present case you have a reasonable doubt as to whether the Government has included in its computation of the defendant's net worth on December 31, 1941—the starting point in this case—all of the defendant's existing assets on that date, you must find the defendant not guilty.

United States v. Fenwick (1949), 7 Cir., 177 F. 2d 488, 492;
United States v. Chapman (1948), 7 Cir., 168 F. 2d 997, 1001;
Bryan v. United States (1949), 5 Cir., 175 F. 2d 223;
Brodella v. United States (1950), 6 Cir., 184 F. 2d 823, 824.

Instruction No. 47.

(Net Worth Method of Proof.)

The Government has put into evidence various income tax returns pertaining to taxable years other than 1945. It should again be mentioned, however, that the defendant is here charged with attempting to evade or defeat income tax owing for the year 1945. He is not on trial for any other year or years. It is not enough in this case for the Government to show, even assuming that it has done so, that over a specified period of years—say from 1942 to 1945—the defendant had a total amount of income which exceeded the total income reported in his tax returns for such period of years. Nor would it be enough for the Government to show that during some particular year prior to 1945 the defendant had income

in excess of the amount reported in his tax return for such year. It is incumbent upon the Government to prove to a moral certainty and beyond a reasonable doubt that the defendant's income during 1945, the only year covered by the indictment, was greater than the amount reported in his return for that year, and that he wilfully filed a false and fraudulent income tax return with intent to evade or defeat the tax due the Government for that year. If, in light of the evidence before you, there remains in the mind of any juror a reasonable doubt that the defendant's income for 1945 was greater than the amount reported in his return for that year, or a reasonable doubt that the defendant wilfully filed a false and fraudulent income tax return with intent to evade or defeat the tax due the Government for that year, then it is the duty of such juror to vote for an acquittal.

Instruction No. 48.

(Net Worth Method of Proof.)

In a case such as this, where the Government relies upon the net worth and expenditures method of proving income, the net worth of the defendant at the beginning of the taxable year—here the year 1945—must be clearly and accurately established by competent evidence to a moral certainty and beyond a reasonable doubt.

United States v. Fenwick (1949), 7 Cir., 177 F. 2d 488, 491-492;

Bryan v. United States (1949), 5 Cir., 175 F. 2d 223, 225;

Brodella v. United States (1950), 6 Cir., 184 F. 2d 823, 824;

United States v. Chapman (1948), 7 Cir., 168 F. 2d 997, 1001.

Instruction No. 49.

(Net Worth Method of Proof.)

The Government's evidence concerning the net worth of the defendant at the starting point—namely, on December 31, 1941—must be so persuasive as to exclude from your minds any reasonable hypothesis or possibility that the defendant had assets on that date which are not accounted for by the Government. If in light of the evidence in this case you have a reasonable doubt on this score, it is your duty to return a verdict of not guilty.

United States v. Fenwick (1949), 7 Cir., 177 F. 2d 488, 491-492;

Bryan v. United States (1949), 5 Cir., 175 F. 2d 223, 226-227;

Brodella v. United States (1950), 6 Cir., 184 F. 2d 823, 824.

Instruction No. 50.

(Net Worth Method of Proof.)

In attempting to prove the defendant's net worth at the starting point—that is, on December 31, 1941—it is not sufficient for the Government simply to list the assets and liabilities it knows about. The Government

must prove to a moral certainty and beyond a reasonable doubt that the defendant had no other assets and liabilities on the crucial date. The defendant is not required to show that the Government's net worth computation is incorrect or incomplete. If the evidence in this case leaves any reasonable doubt in your minds as to whether all of the defendant's assets and liabilities are included in the Government's computation of his net worth on December 31, 1941, it follows that you may not rely upon such computation and you must find the defendant not guilty.

United States v. Fenwick (1949), 7 Cir., 177 F. 2d 488;

Bryan v. United States (1949), 5 Cir., 175 F. 2d 223.

Instruction No. 51.

(Net Worth Method of Proof.)

Before you may accept the Government's theory of this case, you must be satisfied to a moral certainty and beyond a reasonable doubt that the defendant's income for the year 1945, as computed by the net worth and expenditures method, actually represents taxable income for that year and not for some prior year or years. It is not incumbent upon the defendant to prove that the income so computed was accumulated prior to the year 1945.

See:

United States v. Fenwick (1949), 7 Cir., 177 F. 2d 488, 492.

Instruction No. 52.

(Net Worth Method of Proof.)

"* * * Such proof, circumstantial in character, in view of the principles announced, must be such as will exclude every reasonable hypothesis except that of guilt. Evidence of mere probability of guilt, of course, is not sufficient."

Quoted from:

United States v. Fenwick (1949), 7 Cir., 177 F. 2d 488, 490.

Instruction No. 53.

(Net Worth Method of Proof.)

"* * * when the government relies upon the circumstances of increased net worth and expenditures in excess of reported income to establish income tax evasion it must produce evidence that excludes all possible available sources of taxable income from which the increased net worth and the excess expenditures could have been derived * * *. The net worth-expenditures method of establishing net income, sought to be applied in this case, is effective only if the computations of net worth at the beginning and at the end of the questioned periods can reasonably be accepted as accurate."

Quoted from:

United States v. Fenwick (1949), 7 Cir., 177 F. 2d 488, 491.

See also:

Bryan v. United States (1949), 5 Cir., 175 F. 2d 223, 225;

Brodella v. United States (1950), 6 Cir., 184 F. 2d 823, 824;

United States v. Chapman (1948), 7 Cir., 168 F. 2d 997, 1001.

Instruction No. 54.

(Net Worth Method of Proof.)

"Remembering that the government has the burden of proof in a criminal case, that the burden never shifts to defendant, that circumstantial evidence must be of such character as to exclude every reasonable hypothesis except that of guilt, it necessarily follows that, when the government relies upon circumstances of increased net worth and expenditures in excess of reported income to establish income tax evasion, the basic net worth must be established. The defendant is not compelled to take the witness stand; he is not compelled to make proof that he is innocent, but he must be proved guilty by the evidence beyond all reasonable doubt, and where there is uncertainty as to whether all the assets of defendant are included in the government's computation of net worth, it follows that its computations cannot be relied on. Essential proof of no other assets is the cornerstone of the evidence of the government; that cornerstone being faulty, the whole edifice is so weakened as to

be undependable as proof of guilt beyond all reasonable doubt."

Quoted from:

United States v. Fenwick (1949), 7 Cir., 177 F. 2d 488, 492.

Instruction No. 55.

(Defendant's Assets.)

Before you may consider any evidence of any assets belonging to the defendant in computing his net worth, you must first find to a moral certainty and beyond all reasonable doubt that such assets were acquired and paid for by the defendant in the applicable year and you must also find to a moral certainty and beyond all reasonable doubt the cost to the defendant of such assets.